No. 94-9088-CFY
Status: GRANTED

Title: Meirl Gilbert Neal, Petitioner
v.
United States

Docketed:
May 2, 1995

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Costello,Michael J., Bergerson,Donald Thomas

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	May 2 1995	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	May 31 1995		Brief of respondent United States in opposition filed.
4	Jun 1 1995		DISTRIBUTED. June 16, 1995 (Page 15)
5	Jun 12 1995		REDISTRIBUTED. June 16, 1995 (Page 18)
9	Jun 19 1995		Petition GRANTED.
			**********
11	Jul 24 1995		Order extending time to file brief of petitioner on the merits until August 21, 1995.
13	Aug 18 1995		Order extending time to file brief of petitioner on the merits until September 18, 1995.
15	Aug 24 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Seventh Circuit.
14	Aug 28 1995		Record filed.
		*	Original record proceedings U.S. District Court for the Central District of Illinois (4 SEALED ENVELOPES)
16	Sep 12 1995		Order further extending time to file brief of petitioner on the merits until September 20, 1995.
17	Sep 20 1995		Brief of petitioner Meirl G. Neal filed.
18	Sep 20 1995		Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
19	Sep 20 1995		Joint appendix filed.
20	Sep 28 1995		CIRCULATED.
21	Oct 3 1995		SET FOR ARGUMENT MONDAY, DECEMBER 4, 1995. (2ND CASE).
22	Oct 16 1995	G	Motion of petitioner for appointment of counsel filed.
23	Oct 20 1995	X	Brief of respondent United States filed.
24	Oct 23 1995		DISTRIBUTED. October 27, 1995
25	Oct 30 1995		REDISTRIBUTED. NOVEMBER 3, 1995
26	Nov 6 1995		Motion for appointment of counsel GRANTED and it is ordered that Donald Thomas Bergerson, Esquire, of San Francisco, California, is appointed to serve as counsel for the petitioner in this case.
27	Nov 20 1995	X	Reply brief of petitioner filed.
28	Dec 4 1995		ARGUED.

ORIGINAL

94-9088

(2)

Supreme Court, U.S.
FILED
MAY 2 1995
OFFICE OF THE CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

MEIRL GILBERT NEAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTION PRESENTED FOR REVIEW

DOES THE AMENDMENT TO THE GUIDELINES ESTABLISHING PRESUMPTIVE WEIGHT OF LSD FOR PURPOSES OF ESTABLISHING A BASE OFFENSE LEVEL FOR VIOLATIONS INVOLVING LSD, CHANGE THE MANNER OF COMPUTING THE WEIGHT OF LSD FOR PURPOSES OF THE STATUTE IMPOSING MINIMUM SENTENCE FOR POSSESSION OR DISTRIBUTION?

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

MEIRL GILBERT NEAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, MEIRL GILBERT NEAL, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit which misapplied the Sentencing Guidelines by including the actual weight of the LSD carrier medium in ascertaining whether the Petitioner merited a mandatory minimum sentence.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as United States v. Neal, 46 F.3d 1405 (7th Cir. 1995), and appears in Appendix A to this Petition. The amended judgment of the District Court for the Central District of Illinois appears in Appendix B to this Petition. The judgment of the District Court for the Central District of Illinois appears in Appendix C to this Petition.

JURISDICTION

The Court of Appeals' opinion in this matter was filed on February 2, 1995. No Petition for Rehearing was filed in the Court of Appeals. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Amendment V to the United States Constitution is set forth in Appendix D.

Title 21 U.S.C. § 841(b)(1)(A)(v) is set forth in Appendix E.

U.S.S.G. §2D1.1(c) is set forth in Appendix F.

STATEMENT OF THE CASE

The United States District Court for the Central District of Illinois, Springfield Division, the Court of first instance, had jurisdiction pursuant to Title 21 U.S.C. § 846 and Title 21 U.S.C. § 841(a)(1), and 18 U.S.C. § 3231 which provides District Courts

with exclusive jurisdiction of offenses against the United States. Jurisdiction in the present Petition was conferred by 18 U.S.C. § 3582(c)(2).

Until recently, the Sentencing Guidelines also used the entire weight of the "mixture or substance," including the weight of the carrier medium, to determine the applicable sentencing range for crimes involving LSD. See U.S.S.G. § 2D1.1 and commentary. Effective November 1, 1993, however, the united States Sentencing Commission amended § 2D1.1 by prescribing a uniform (and somewhat less stringent) formula for calculating LSD quantity. See United States v. Boot, 25 F.3d 52, 54 (1st Cir. 1994). The new Guideline approach (amendment 488) establishes a presumptive weight of 0.4 milligrams per dose of LSD, regardless of the carrier medium. U.S.S.G. § 2D1.1. The district courts have discretion to apply this new formula retroactively, see 18 U.S.C. § 3582(c)(2); U.S.S.G. § 1B1.10(a) & (d), so that in appropriate circumstances a defendant may be considered for a reduction in a previously imposed sentence. United States v. Holmes, 13 F.3d 1217, 1222 (8th Cir. 1994).

On May 26, 1988 the Petitioner was charged in a Indictment with Count I charging conspiracy and distribution of LSD (10 grams or more), in violation of 21 U.S.C. § 846, and in Count II of possession with intent to distribute LSD (10 grams or more), in violation of 21 U.S.C. § 841(a)(1). The Petitioner plead guilty to both counts on February 13, 1989.

At sentencing, the district court held Neal accountable for blotter paper containing 11,456 doses of "hits" of LSD. The actual weight (including the carrier medium) of the 11,456 doses that Neal had possessed and conspired to distribute was 109.51 grams. This weight gave Neal, who fell int the Criminal History III category because of prior drunk driving convictions a base offense level of 36. The offense level was reduced by two points for Neal's acceptance of responsibility, resulting in a final offense level of 34 and a sentencing range of 188 to 235 months. Accordingly, the district court sentenced Neal to 192 months of imprisonment on each count (the sentences to run concurrently) and five years of supervised release.

On December 10, 1993, Neal filed a pro se motion to reduce his sentence because of the intervening amendment to the Sentencing Guidelines. The district court elected to apply the amendment retroactively and recalculated the weight of the 11,456 doses as 4.58 grams. The recalculation gave neal a base offense level of 28. Subtracting three points for acceptance of responsibility (Neal was allowed an additional one-point reduction for a timely plea), the district court placed Neal at a final offenses level of 25, which provides in the Criminal History III category a sentencing range of 70 to 87 months.

However, the district court held that it had to follow the Chapman definition of "mixture or substance" in calculating the weight of the LSD for determining the applicability of any minimum penalty under § 841(b)(1). The weight of the LSD blotter paper for

which Neal was convicted, 109.51 grams, mandated a minimum sentence of ten years. 846 F.Supp. 1362. 21 U.S.C. § 841(b)(1)(A)(v) (providing for a mandatory minimum ten year sentence for conviction involving more than 10 grams of LSD); U.S.S.G. § 5G1.1(b). The court therefore set Neal's sentence at 120 months. Neal objected, asserting that court should have used the 4.58 gram calculation, which would require a mandatory minimum of only five years for a conviction involving more than one gram of LSD, 21 U.S.C. § 841(b)(1)(B)(v), and allow the court to impose a sentence between 70 and 87 months.

The Petitioner thereafter appealed the amended judgment sentence to the United States Court of Appeals for the Seventh Circuit. Petitioner reargued before the Court of Appeals, en banc, that the District Court misapplied the Sentencing Guidelines by including the actual weight of the LSD carrier medium in ascertaining that the Petitioner merited a mandatory minimum sentence.

The Petitioner made three basic arguments for using the per dose weight calculation instead of the total weight calculation prescribed in Chapman v. U.S. 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991), in deciding whether to impose a mandatory minimum penalty for his conduct under 21 U.S.C. § 841(b)(1). First the Petitioner argued that the presumptive weight approach reflected in U.S.S.G. § 2D1.1, as amended, applies to the determination of both a defendant's base offense level and his eligibility for the statutory mandatory minimum sentence. The

Petitioner argued that Chapman supra, does not conflict with this interpretation because Congress, through its inaction, has accepted the Guidelines amendment as the authoritative definition of the phrase "mixture or substance" for purposes of both the Guidelines and the mandatory minimum sentencing scheme. The Petitioner also maintains that to the extent Chapman supra, requires inclusion of the weight of the carrier medium, the amended Guidelines' weight calculation does include, in part, the weight of the carrier and is thus merely an application of Chapman supra. Second, the Petitioner argued that the "dual weight" sentencing scheme used by the district court is so illogical and unjust that it violates the Due Process Clause. Third, the Petitioner contended that the dual method of weight calculation under the amended Guidelines creates an ambiguity that required the Seventh Circuit to invoke the rule of lenity and impose a lesser punishment.

The Seventh Circuit addressed each argument and held that the District Court applied the relevant statute and guideline as both Congress and the Commission intended, that the rule of lenity does not apply and that using a presumptive weight to calculate the base offense level and using the actual weight to determine eligibility for the mandatory minimum sentence is a rational scheme and does not violate due process.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons: This Petition presents an issue resolved by the Seventh Circuit and other Circuits which have construed U.S.S.G. § 2D1.1, as amended to determine that the retro amendment should not be used to calculate the weight of the subject LSD to determine whether a case falls under the statutory mandatory minimum sentence provision. Secondly, using a presumptive weight to calculate the base offense level and the actual weight to determine eligibility for the mandatory minimum sentence creates and illogical and arbitrary distinction between defendants that violates the due process clause of the Fifth Amendment. This Petition presents issues not specifically and unequivocally decided by this Court, and the manner in which the Seventh Circuit has construed the amendment is contrary to the intention of Congress and the plain meaning proposed effect of the amendment.

Here, the Seventh Circuit found that the presumptive weight approach reflected in U.S.S.G. § 2D1.1, as amended, applies to the determination of both a defendant's base offense level and his eligibility for the statutory mandatory minimum sentence. In addition, the following Circuits have addressed this issue in holding or dictum and have arrived at the same conclusion as the Seventh Circuit[1]

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[1]First Circuit: United States v. Dimeo, 28 F.3d 240, 241 (1st Cir. 1994); Fifth Circuit: United States v. Pardue, 36 F.3d 429, 431 (5th Cir. 1994); Sixth Circuit: Cox v. United States, No. 94-3041, 1994 WL 443250, at **2, 1994 U.S. App. Lexis 22188, at *4 (6th Cir. Aug. 16, 1994); Seventh Circuit: United States v. Sassi, No. 94-1363, 1994 WL 450134, 1994 U.S. App. Lexis 22932 (7th Cir. Aug. 22, 1994); Eighth Circuit: United States v. Stoneking, 34 F.3d 651 (8th Cir. 1994); Tenth Circuit: United States v. Mueller,

To fully understand the significant legal issues in dispute in this case, Petitioner respectfully suggests it is useful to identify what is not at issue. It is clear beyond dispute that U.S.S.G. § 5G1.1(b) requires that where a mandatory minimum sentence applies, and such mandatory minimum is greater than the applicable guideline sentence, the mandatory minimum controls. This rule is simple to apply when the drug quantity is such that it brings into play a mandatory minimum sentence as well as guideline range. Obviously, until now, the drug quantity used for both purposes was the same. What this Court has the opportunity to decide, however, is whether it is permissible, logical, just, or indeed intended by Congress, or by the Sentencing Commission, to use one method of calculating weight for guideline sentencing and a completely different method of calculating weight of the exact quantity of drug found to be involved in the crime for purposes of determining whether a mandatory minimum sentence applies.

The mandatory minimum sentences already enhance penalties above those established by the Sentencing Commission in certain situations. To further enhance drug amounts used for mandatory minimum determination only provides a multiplying enhancement far and above the guidelines. Such a disparity was never wanted nor intended by Congress, the Commission or the courts.

The disparate effect of mandatory minimums is further distorted by applying a greater weight for the mandatory minimum purposes than for guideline purposes were the same actual quantity

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27 F. 3d 494, 496-97 (10th Cir. 1994). Two Circuits have reserved ruling on the question: Ninth Circuit: United States v. Staufer, 38 F.3d 1103, 1108 n.2 (9th Cir. 1994); Eleventh Circuit: United States v. Smith, 39 F.3d 1143, 1146 n.2 (11th Cir. 1994)

is involved in both cases. Utilizing the guideline formula does not conflict with the holding of this Court in Chapman v. United States, 500 U.S. 453, 111 S.Ct. 114 L.ed.2d 524 1919 (7th Cir. 1991) as suggested by the Seventh Circuit.

In determining the appropriate sentencing methodology, it must begin with the statute. Section 841(a) of Title 21 proscribes the distribution of certain substances including LSD. Section 841(b)(1)(B)(v) establishes a mandatory minimum sentence for the distribution of certain amounts of a "mixture of substance" containing a detectible amount of LSD. Pursuant to statutory authority, 28 U.S.C. § 994(p), to said sentencing ranges for the distribution of contraband substances, the United States Sentencing Commission has set a range of terms of imprisonment for violations of the statute. These terms of imprisonment are correlated to the weight of controlled substance. Section 2D1.1(c) was amended on November 1, 1993 in the notes following the Drug Quantity Table by inserting the following additional paragraph at the end:

> In the case of LSD on a carrier media (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier media. Instead, treat each dose of LSD on the carrier media as equal to 0.4 mg. of LSD for the purposes of the Drug Quantity Table.

Thus, the Petitioner, argues that the Commission by inference indicated that the per dose weight calculation (presumptive weight approach) should be utilized to determine whether a mandatory minimum sentence should be imposed and Congress approved it by its silence as to the amendment to U.S.S.G. § 2D1.1(c). The Seventh Circuit and the other Circuits have misconstrued the amendment. To

adopt the argument of the Petitioner fully takes into account this Court's interpretation of § 841(b) in Chapman, supra, with respect to the mandatory minimum sentence provision.

The dissent in the Seventh Circuit opinion authored by Circuit Judge Ripple eloquently stated this contention when he said:

> In the "Background" Commentary to § 2D1.1 in selecting 0.4 mg, the Commissioners noted that this weight exceeded the standard dosage unit of 0.05 mg for pure LSD as calculated by the Drug Enforcement Administration. It justified that higher weight on the ground that justice required that the carrier medium be calculated evenhandedly into the sentencing determination. The Commission gave two reasons for this inclusion of the carrier medium: (1) The weight of most controlled substances in the Drug Quantity Table includes the amount of a carrier medium; (2) In Chapman v. United States, 500 U.S. 453 (1991), the Supreme Court interpreted the statutory section imposing a mandatory minimum sentence for the distribution of a single gram or more of a mixture or substance containing LSD to require the inclusion of the carrier medium within the weight calculation. Therefore, inpromulgating this method of calculating the weight of LSD in Amendment 488 after the Supreme Court's decision in Chapman, the Commission expressly addressed the need to comply with the Supreme Court's interpretation of the statute in Chapman. Congress, having been explicitly advised of this change and of the Commission's interpretation of the Supreme Court's reading of the statute, took no action to countermand the Commission's promulgation. Therefore, the Sentencing Guideline's § 2D1.1(c), as revised by Amendment 488, is consistent with 21 U.S.C. § 841(b). It fully takes into account the Supreme Court's interpretation of § 841(b) in Chapman with respect to the mandatory minimum sentence provision. Accordingly, it should govern the weight calculations of controlled substances for sentencing determinations.
>
> 46 F.3d at 1412.

Chapman, supra, does not mandate the result reached by the Seventh Circuit or any of the other Circuits. Chapman, supra, decided whether eligibility for the mandatory minimum sentence under 21 U.S.C. § 841(b) was to be determined but the weight of the pure LSD or of the carrier medium containing the LSD. It held that the mandatory minimum statute required the weight of the carrier needed to be included when determining the sentence. Faced with

counting the negligible weight of the pure LSD or the weight of the carrier the Court could only chose the weight of the carrier with the pure drug.

Finally, as to the appropriate construction of the guideline amendment regarding its practicable effect to avoid injustice in determining the intent of Congress and the Commission Justice Ripple stated in his dissent in the opinion below that:

> Any lingering doubt as to the appropriate reading of the guideline commentary ought to be dispelled by an examination of the practical effect of the majority's interpretation. Under the "dual weight" method of calculation, an LSD trafficker would receive the mandatory minimum sentence of five years for one gram or more of LSD by selling LSD in approximately one-half of a sugar cube or 125 blotter paper squares. See U.S.S.G. amend. 488 (noting that average weights of sugar cube and blotter square are 2000 mg and 8 mg. respectively); cf Chapman, 500 U.S. at 458 n.2 (reproducing chart in which weights of various carrier media are listed; using these weights, a dealer could qualify for the five-year mandatory minimum by selling LSD in approximately one-half of a sugar cube, 72 blotter paper squares, or 445 gelatin capsules). By contrast, under the Sentencing Commission's method, whether as LSD trafficker receives the five-year mandatory minimum sentence will not depend on the type of medium he happens to use but on the number of doses he sells.
>
> 46 F.3d 1414.

Petitioner also asserts that if such an artificial distinction is applied to the defendant, it would lead to an artificial disparity in sentencing, in violation of the Rule of Lenity which requires an ambiguous statute of this type to be interpreted in the defendant's favor. See United States v. Bass 404 U.S. 336 (1971); Callanan v. United States, 364 U.S. 587 (1961); Moskal v. United States, 498 U.S. 103 (1990). Therefore, the Rule of Lenity should be imposed requiring the amendment's prescriptive weight approach to determine the Petitioner's eligibility for a mandatory minimum sentence.

Similarly, creating an artificial distinction for purposes of enhancing a sentence is a violation of the due process clause of the Fifth Amendment. Marshall v. United States, 414 U.S. 417 (1974).

The Petitioner further contends that using a presumptive weight to calculate the base offense level and the actual weight to determine eligibility for the mandatory minimum sentence creates an illogical and arbitrary distinction between defendants that violates the Due Process Clause of the Fifth Amendment.

It has been held that an irrational federal sentencing scheme denies equal protection of the laws and violates the due process clause of the Fifth Amendment. Marshall v. United States, 414 U.S. 417 (1974). Under this standard, if a distinction is made in a sentencing statute, a rational basis must be established to support that distinction. McGinnis v. Royster, 410 U.S. 263 (1973). The holding of the Seventh Circuit creates an arbitrary distinction by establishing one method of calculating the weight of LSD for guidelines purposes and a completely different method for mandatory minimum purposes, which has the effect of dramatically increasing the difference between mandatory minimum sentences and guideline sentences which are drastically reduced.

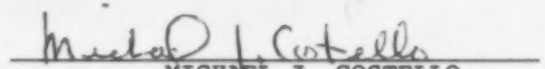
This Court should grant certiorari here to explicitly rule that a per dose weight calculation instead of the Chapman, supra, weight calculation should be used in deciding whether to impose a mandatory minimum penalty under 21 U.S.C. § 841(b)(1) pertaining to LSD.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

DATED: May 1, 1995.

Respectfully submitted,



MICHAEL J. COSTELLO
Attorney for Petitioner

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

Title 21 U.S.C. § 841(b)(1)(A)(v)

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:. . .

(1)(A) In the case of a violation of subsection (a) of this section involving-. . .

> (v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);. . .

such a person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provision of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both.

APPENDIX E

U.S.S.G. § 2D1.1(c)

§ 2D1.1(c) is amended in the notes following the Drug Quantity Table by inserting the following additional paragraph at the end:

> In the case of LSD on a carrier medium (e.g., a sheet of blotter papér), do not use the weight of the LSD carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table."

The Commentary to Sec. 2D1.1 captioned "Application Notes" is amended by inserting the following additional note:

> LSD on a blotter paper carrier medium typically is marked s that the number of doses ("hits") per sheet readily can be determined. When this is not the case, it is to be presumed that each 1/4 inch by 1/4 inch section of the blotter paper is equal to one dose.
>
> In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted."

The Commentary to Sec. 2D1.1 captioned "Background" is amended by inserting the following paragraphs at the end:

> Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.
>
> The dosage weight of LSD selected exceeds the Drug Enforcement Administrations's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard t purity, and (B) the decision in Chapman v. United States, 111 S.Ct. 1919 (1991) (holding that the term "mixture of substance" in 21 U.S.C. Sec. 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose

APPENDIX F

selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD> (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of 'mixture of substance" for the purpose of applying any mandatory minimum sentence (see Chapman; Sec.5G1.(b))."

Reason for Amendment: The Commission has found that the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself (e.g., LSD is typically placed on blotter paper which generally weights rom 5 to 10 milligrams per dose; the weight of the LSD itself per dose is generally from 0.02 to 0.08 milligram; the Drug Enforcement administration describes a standard dose of LSD as containing 0.05 milligram of LSD). as a result, basing the offense level on the entire weight of the LSD and carrier medium produces unwarranted disparity among offenses involving the same quantity of actual LSD but different carrier weights, as well as sentences that are disproportionate to those for other, more dangerous controlled substances, such as PCP, heroin, and cocaine. Under the guidelines prior to the amendment, for example, 100 grams of heroin or 500 grams of cocaine (weights that correspond to several thousand doses, the number depending upon the purity) result in the same offense level as 125 doses of LSD on blotter paper (which has an average weight of 8 milligrams per dose) or 1 dose of LSD on a sugar cube (2000 milligrams per dose).

Consequently, in cases involving LSD contained i a carrier medium, this amendment establishes a weight per dose of 0.4 milligram to be used for purposes of determining the base offense level. the dosage weight of LSD selected by the Commission exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on aa carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in Chapman v. United States, 111 S. Ct. 1919 (1991) (holding that the term "mixture of substance" in 21 U.S.C. Sec. 841(b)(1) includes the carrier medium in which LSD is absorbed). at the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. Treating LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent t those for PCP (for example, 2000 doses of LSD at 0.5 milligram per dose equals 1 gram of LSD - corresponding to the lower limit of offense level 26; similarly, 2000 doses of PCP at 5 milligrams per dose, the standard amount of actual PCP in a dose,equals 10 grams of actual PCP - corresponding to the lower limit of offense level 26). Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the definition of mixture or substance for purposes of applying any mandatory minimum sentence (see Chapman; Sec. 5G1.1(b)).

to the Funds' attorneys' fee award. Furthermore, the district court is directed to award reasonable attorneys' fees to the Funds in connection with this appeal in an amount to be determined by the district court.

UNITED STATES of America, Plaintiff-Appellee,

v.

Meirl Gilbert NEAL, Defendant-Appellant.

No. 94-1773.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 22, 1994.

Reargued En Banc Nov. 22, 1994.

Decided Feb. 2, 1995.

Defendant was convicted of conspiracy to distribute and possession with intent to distribute LSD-laced water paper laced with lysergic acid diethylamide (LSD), in the United States District Court for the Central District of Illinois, Richard Mills, J., 846 F.Supp. 1362. Defendant appealed his sentence. The Court of Appeals, Flaum, Circuit Judge, held that amendment to guidelines, establishing presumpcive weight of LSD for purposes of establishing base offense level for violations involving drug, did not change manner of computing weight of LSD for purposes of statute imposing minimum sentence for possession or distribution.

Affirmed.

Ripple, Circuit Judge, dissented and filed opinion with which Cummings and Ilana Diamond Rovner, Circuit Judges, joined.

1. Drugs and Narcotics ⇐133

Amendment of Sentencing Guidelines, provide that there would be a presumptive weight of 0.4 milligrams per dose of lysergic acid diethylamide (LSD), did not change basis for determining quantity of LSD that would require imposition of mandatory minimum sentence under statute, which continued to be based upon weight of LSD and medium in which it was transmitted. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1), 21 U.S.C.A. § 841(b)(1); U.S.S.G. § 2D1.1, comment. (backg'd.), 18 U.S.C.A.

2. Constitutional Law ⇐251.3

Statute runs afoul of due process clause only if it manifests patently arbitrary classification, utterly lacking in rational justification. U.S.C.A. Const.Amend. 5.

3. Constitutional Law ⇐270(2)
Drugs and Narcotics ⇐133

Sentencing scheme under which presumptive weight of lysergic acid diethylamide (LSD) was used to calculate base offense level under Sentencing Guidelines, and actual weight including weight of carrier was used to determine eligibility for mandatory minimum sentence, did not create illogical and arbitrary distinction between defendants violating due process clause; minimum sentence was buttressed by rational objective of penalizing volume dealers of product, and to extent that person involved in sufficient doses to exceed minimum sentence threshold weight might receive much heavier sentence than dealer dispensing only a few less doses. it is up to Congress to deal with disparity and not courts. U.S.C.A. Const.Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1), 21 U.S.C.A. § 841(b)(1); U.S.S.G. § 2D1.1, comment. (backg'd.), 18 U.S.C.A.

4. Drugs and Narcotics ⇐133

Rule of lenity would not be applied to resolve alleged ambiguity engendered by use of actual weight of lysergic acid diethylamide (LSD) and its carrier in determining eligibility for mandatory minimum sentence, and presumptive weight to calculate base offense level under Sentencing Guidelines; there was not ambiguity, as both statute and guidelines instructed court to impose minimum if weight of LSD plus carrier exceeded specified amount and consequence was not so absurd or glaringly unjust as to make court consider whether result comported with congressional intent. U.S.C.A. Const.Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1), 21 U.S.C.A. § 841(b)(1); U.S.S.G. § 2D1.1, comment. (backg'd.), 18 U.S.C.A.

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Michael J. Costello (argued), Costello Law Office, Springfield, IL, for defendant-appellant.

Before POSNER, Chief Judge, and CUMMINGS, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, and ROVNER, Circuit Judges.

FLAUM, Circuit Judge.

Defendant Meirl Gilbert Neal was convicted of conspiracy to distribute and possession with intent to distribute LSD-laced blotter paper and received a statutory minimum sentence of ten years imprisonment. Neal contests his sentencing, arguing that the district court misapplied the Sentencing Guidelines by including the actual weight of the LSD carrier medium in ascertaining whether Neal merited a mandatory minimum sentence. We hold that the district court properly calculated Neal's sentence and therefore affirm.

I.

Understanding Neal's objection to his sentence requires a brief history of Congress's and the Sentencing Commission's approach to drug-related sentencing. In 1986, Congress adopted a "market-oriented" approach to punishing drug trafficking, *see* Anti-Drug Abuse Act of 1986, Pub.L. 99-570, 100 Stat. 3207 (1986), aimed at punishing retail and wholesale dealers "according to the weight of the drugs in whatever form they were found—cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level." *Chapman v. United States*, 500 U.S. 453, 461, 111 S.Ct. 1919, 1925, 114 L.Ed.2d 524 (1991). Acting under this principle, Congress set mandatory minimum sentences corresponding to the weight of a "mixture or substance containing a detectable amount" of various controlled substances, including LSD. *See id.* (citing 21 U.S.C. §§ 841(b)(1)(A)(i)–(viii) and (B)(i)–(viii)). The statutory provision at issue both here and in *Chapman*, 21 U.S.C. § 841(b)(1), provides for mandatory minimum sentences for distributing more than a certain amount of a "mixture or substance containing a detectable amount" of LSD. The Court, applying an "ordinary meaning" to the key terms "mixture" and "substance," concluded that the weight of the blotter paper containing LSD, and not the weight of the pure drug alone, determines eligibility for the mandatory minimum sentence. *See Chapman*, 500 U.S. at 461–63, 111 S.Ct. at 1925–26.

Until recently, the Sentencing Guidelines also used the entire weight of the "mixture or substance," including the weight of the carrier medium, to determine the applicable sentencing range for crimes involving LSD. *See* U.S.S.G. § 2D1.1 and commentary. Effective November 1, 1993, however, the United States Sentencing Commission amended § 2D1.1 by prescribing a uniform (and somewhat less stringent) formula for calculating LSD quantity. *See United States v. Boot*, 25 F.3d 32, 34 (1st Cir.1994). The new Guideline approach (Amendment 488) establishes a presumpcive weight of 0.4 milligrams per dose of LSD, regardless of the carrier medium. U.S.S.G. § 2D1.1. The district courts have discretion to apply this new formula retroactively, *see* 18 U.S.C. § 3582(c)(2); U.S.S.G. § 1B1.10(a) & (d), so that in appropriate circumstances a defendant may be considered for a reduction in a previously imposed sentence. *United States v. Holmes*, 13 F.3d 1217, 1222 (8th Cir.1994).

Defendant Neal was charged with conspiracy to distribute LSD, in violation of 21 U.S.C. § 846, and possession with intent to distribute LSD, in violation of 21 U.S.C. § 841(a)(1). Neal pleaded guilty to both counts on February 13, 1989. At sentencing, the district court held Neal accountable for blotter paper containing 11,456 doses or

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"hits" of LSD. The actual weight (including the carrier medium) of the 11,456 doses that Neal had possessed and conspired to distribute was 109.51 grams. This weight gave Neal, who fell into the Criminal History III category because of prior drunk driving convictions, a base offense level of 36. The offense level was reduced by two points for Neal's acceptance of responsibility, resulting in a final offense level of 34 and a sentencing range of 188 to 235 months. Accordingly, the district court sentenced Neal to 192 months of imprisonment on each count (the sentences to run concurrently) and five years of supervised release.

On December 10, 1993, Neal filed a pro se motion to reduce his sentence because of the intervening amendment to the Sentencing Guidelines. The district court elected to apply the amendment retroactively and recalculated the weight of the 11,456 doses as 4.58 grams. The recalculation gave Neal a base offense level of 28. Subtracting three points for acceptance of responsibility (Neal was allowed an additional one-point reduction for a timely plea), the district court placed Neal at a final offense level of 25, which provides in the Criminal History III category a sentencing range of 70 to 87 months.

However, the district court held that it had to follow the *Chapman* definition of "mixture or substance" in calculating the weight of the LSD for determining the applicability of any minimum penalty under § 841(b)(1). The weight of the LSD blotter paper for which Neal was convicted, 109.51 grams, mandated a minimum sentence of ten years. 846 F.Supp. 1282. 21 U.S.C. § 841(b)(1)(A)(v) (providing for a mandatory minimum ten year sentence for conviction involving more than 10 grams of LSD); U.S.S.G. § 5G1.1(b). The court therefore set Neal's sentence at 120 months. Neal objected, asserting that court should have used the 4.58 gram calculation, which would require a mandatory minimum of only five years for a conviction involving more than one gram of LSD. 21 U.S.C. § 841(b)(1)(B)(v), and allow the court to impose a sentence between 70 and 87 months. The court overruled Neal's objection and this appeal followed.

II.

The sole issue on appeal is whether the district court properly determined that an amendment to the Sentencing Guidelines prescribing a presumptive per dose weight of LSD applies to the calculation of a defendant's base offense level but not to his eligibility for a statutory mandatory minimum sentence.[1] An interpretation of the Guidelines and its amendments presents a question of law which we *review de novo*. *United States v. Jones*, 983 F.2d 1425, 1429 (7th Cir.1993). The particular question raised here is one of first impression in our circuit. *Cf. United States v. Tucker*, 20 F.3d 242, 244 (7th Cir.1994) (making reference to the presumptive weight for LSD under the Guidelines in the context of determining whether a defendant was subject to a mandatory minimum sentence for distribution of cocaine); *United States v. Sassi*, 23 F.3d 56 (7th Cir. 1994) (table) (unpublished opinion, text at 1994 WL 450134, 1994 U.S.App. LEXIS 30412) (disposing of similar issues without published opinion).

Neal makes three basic arguments for using the per-dose weight calculation instead of the *Chapman* weight calculation in deciding whether to impose a mandatory minimum penalty for Neal's conduct under 21 U.S.C. § 841(b)(1). First, Neal submits that the presumptive weight approach reflected in U.S.S.G. § 2D1.1, as amended, applies to the determination of both a defendant's base offense level and his eligibility for the statutory mandatory minimum sentence. Neal argues that *Chapman* does not conflict with this interpretation because Congress, through its inaction, has accepted the Guidelines amendment as the authoritative definition of the phrase "mixture or substance" for purposes of both the Guidelines and the mandatory minimum sentencing scheme. Neal also maintains that to the extent *Chapman* requires inclusion of the weight of the carrier medium, the amended Guidelines' weight calculation does include, in part, the weight of the carrier and is thus merely an application of *Chapman*. Second, Neal suggests that the "dual weight" sentencing scheme used by the district court is so illogical and unjust that it violates the Due Process Clause. Third, Neal contends that the dual method of weight calculation under the amended Guidelines creates an ambiguity that requires us to invoke the rule of lenity and impose a lesser punishment. We address each argument in turn.

1. Neal also challenges the enhancement of his criminal history because the court calculated it based on Neal's prior alcohol related driving offenses. Neal asserts that including such convictions, where the defendant was arguably an alcoholic and unable to control his drinking, violates due process and equal protection rights under the Fifth Amendment. The fact that we are upholding the mandatory minimum sentence renders the calculation of criminal history irrelevant and Neal's appeal on this point moot. We therefore express no opinion as to the merits of this argument.

A.

[1] Under the district court's interpretation of federal law, a single amount of LSD is assigned two different weights for sentencing purposes: one weight for determining the base offense level under the Guidelines and another weight for determining eligibility for the mandatory minimum sentence provided in 21 U.S.C. § 841(b)(1)(A)(v). The Guidelines, as the Supreme Court has observed, "were meant to establish a range of determinate sentences for categories of offenses and defendants according to various specified factors." *Mistretta v. United States*, 488 U.S. 361, 368, 109 S.Ct. 647, 653, 102 L.Ed.2d 714 (1989), in order to provide certainty and fairness and to eliminate unwarranted disparities in the sentences imposed upon similarly situated defendants. *See* 28 U.S.C. § 991(b)(1)(B). At the same time, however, the Commission itself has long recognized that Congress has been of two minds with respect to sentencing federal criminals:

> The sentencing guidelines system is essentially a system of finely calibrated sentences. For example, as the quantity of drugs increases, there is a proportional increase in the sentence. In marked contrast, the mandatory minimums are essentially a flat, tariff-like approach to sentencing. Whereas guidelines seek a smooth continuum, mandatory minimums result in "cliffs." The "cliffs" that result from mandatory minimums compromise proportionality, a fundamental premise for just punishment, and a primary goal of the Sentencing Reform Act.

United States Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (summary) (August 1991); *see also United States v. McFadden*, 13 F.3d 463, 467–68 (1st Cir.1994) (Breyer, C.J., dissenting) (noting that mandatory minimum statutes represent an "ad hoc derivation" from the more general policy reflected in the Sentencing Guidelines). Though they seem to make an odd pair, it must be noted that the Guidelines and statutory mandatory minimum scheme were enacted by Congress almost simultaneously and continue to coexist, and sometimes overlap. Indeed, the Guidelines specifically contemplate conflict between the two schemes, and direct that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." U.S.S.G. § 5G1.1.

The post-amendment Commentary[2] to § 2D1.1 clearly indicates that the Commission promulgated Amendment 488 in full recognition that it would create a "dual weight" system of calculating the weight of LSD for sentencing purposes and that where the Guidelines approach conflicted with the statutory mandatory minimum scheme, the latter would prevail. The first paragraph of that Commentary notes that "in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligrams *for purposes of determining the base offense level.*" U.S.S.G. § 2D1.1 Commentary (emphasis supplied). The Commentary concludes by stating that "this approach *does not override* the applica-

2. Commentary in the Guidelines, at least if it is interpreting a specific guideline, is to be given the same force and effect as the Guidelines language itself unless the Commentary "violates the Constitution or a federal statute, or it is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, — U.S. —, —, 113 S.Ct. 1913, 1920, 123 L.Ed.2d 598 (1993); *United States v. Lamb*, 6 F.3d 415, 420 (7th Cir.1993).

bility of 'mixture or substance' for the purpose of applying any mandatory minimum sentence," citing both *Chapman* and U.S.S.G. § 5G1.1(b). *Id.* Even if an amendment to the Sentencing Guidelines could supercede the Supreme Court's interpretation of a separate statute, these two sentences make clear that the amendment to § 2D1.1 purported to do no such thing. In any event, this is not a case like *McFadden*, in which we might "read language in different, but related, statutes, so as best to reconcile those statutes, in light of their purposes and of common sense." 13 F.3d at 467 (Breyer, C.J., dissenting) (arguing that the majority's interpretation of the word "use" in a statute (18 U.S.C. § 924(c)) prescribing a mandatory minimum sentence to encompass "possession" unnecessarily swallows up a guideline (U.S.S.G. § 2D1.1(b)(1)) that distinguishes among different kinds of drug- and gun-related criminal behavior). Here, the Supreme Court has authoritatively construed the term "mixture or substance" in 21 U.S.C. § 841(b)(1)[3] to mean that "[s]o long as it contains a detectable amount, the entire mixture or substance is to be weighed when calculating the sentence." *Chapman*, 500 U.S. at 459, 111 S.Ct. at 1924; *see also Boot*, 25 F.3d at 55 ("Until the Supreme Court or the Congress revisits the issue, *Chapman* governs the meaning of the term 'mixture or substance' in 21 U.S.C. § 841(b)(1)(B)(v), as the Commission itself acknowledged when it promulgated Amendment 488."). The Commission is without authority to override *Chapman*.[4] As Judge Easterbrook has noted, "[t]he Sentencing Reform Act creates only the power to guide judicial discretion within the statutory limits." *United States v. Seacott*, 15 F.3d 1380, 1392 (7th Cir.1994) (Easterbrook, J., concurring); it does not "vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime." *Mistretta*, 488 U.S. at 396, 109 S.Ct. at 667. Congress has authorized the Commission to permit sentences lower than mandatory minima, 18 U.S.C. § 3553(e), but only within the parameters laid out by that statutory provision. *See id.* (authorizing departures for substantial assistance to the government and for mitigating circumstances not adequately taken into consideration in the formulation of the Guidelines); *see also* U.S.S.G. § 5K2.0. The Commission understood all of these limitations on its power, and the district court applied the relevant statute and guideline as both Congress and the Commission intended.

B.

[2] Neal next contends that using a presumptive weight to calculate the base offense level and the actual weight to determine eligibility for the mandatory minimum sentence creates an illogical and arbitrary distinction between defendants that violates the Due Process Clause of the Fifth Amendment. A statute runs afoul of the Due Process Clause only if it "manifests a patently arbitrary classification, utterly lacking in rational justification." *Weinberger v. Salfi*, 422 U.S. 749, 768, 95 S.Ct. 2457, 2468, 45 L.Ed.2d 522 (1975); *see also United States v. Lawrence*, 951 F.2d 751, 754 (7th Cir.1991). Moreover, the statute's justification need not be expressly articulated or readily apparent "so long as a court can divine some rational purpose." *United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C.Cir.1989) (citation omitted).

[3] In *Chapman*, the Supreme Court expressly found that Congress had a rational basis for the market-oriented sentencing scheme reflected in 21 U.S.C. § 841(b)(1)(B)(v):

> By measuring the quantity of drugs according to the "street weight" of the drugs in the diluted form in which they are sold, rather than according to the net weight of the active component, the statute and the Sentencing Guidelines increase the penalty for persons who possess large quantities of drugs, regardless of their purity. That is a rational sentencing scheme.

500 U.S. at 465, 111 S.Ct. at 1927–28. Subsequently, the Commission decided to establish a presumptive weight per dose of LSD for purposes of determining the defendant's base level "[b]ecause the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself." U.S.S.G. § 2D1.1 Commentary. As a result of this "dual weight" scheme, a defendant who is accountable for no more than approximately 104 doses on blotter paper like Neal's may receive a sentence ranging from probation to a few months imprisonment, *see* U.S.S.G. § 5C1.1, comment (n. 3), while a defendant who exceeds that threshold will qualify for a mandatory minimum five-year sentence.[5] In such circumstances, the statutory mandatory minimum creates a very steep "cliff" for the unlucky drug dealer who is caught distributing a few more doses than a more fortunate cohort. While this may be an ill-advised policy that metes out a severe punishment, it does have a rational basis—those who deal more LSD will be punished more heavily than those who deal less, and at a certain point there is a qualitative leap in the seriousness of the deed that will give rise to a sudden rather than an incremental increase. Such judgments are for Congress, not the courts, and we will not interfere with them.

[4] Neal also asks us to invoke the rule of lenity in view of an alleged ambiguity engendered by using two different methods to determine the weight of LSD for sentencing purposes. "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971). However, the rule of lenity is inapplicable unless there is a "grievous ambiguity or uncertainty in the language and structure of the Act," *Huddleston v. United States*, 415 U.S. 814, 831, 94 S.Ct. 1262, 1272, 39 L.Ed.2d 782 (1974), such that even after a court has "seize[d] everything from which aid can be derived," it is "left with an ambiguous statute." *United States v. Bass*, 404 U.S. 336, 347, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971) (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386, 2 L.Ed. 304 (1805)); *see also United States v. Shabani*, — U.S. —, —, 115 S.Ct. 382, 386, 130 L.Ed.2d 225 (1994) ("The rule of lenity, however, applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute.").

Such ambiguity does not exist here. The statute and sentencing guidelines clearly instruct the court to impose a minimum ten-year sentence if the weight of any LSD and its carrier medium exceed 10 grams. Neal has presented nothing to this court to undermine that conclusion, and that conclusion does not produce consequences "so absurd or glaringly unjust" as to make us reconsider whether the result comports with Congress' intent. *United States v. Rodgers*, 466 U.S. 475, 484, 104 S.Ct. 1942, 1948, 80 L.Ed.2d 492 (1984). As such, the rule of lenity does not apply.

D.

Finally, we note that every other court to have considered this issue has arrived at the same conclusion we have. *See United States v. Purvis*, 36 F.3d 429 (5th Cir.1994); *Cox v. United States*, 35 F.3d 565 (6th Cir.1994) (table) (unpublished opinion, text at 1994 WL 443250, 1994 U.S.App. Lexis 22188); *United States v. Dimeo*, 28 F.3d 240 (1st Cir.1994); *United States v. Mueller*, 27 F.3d 494 (10th

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1. In *Chapman*, the Supreme Court expressly interpreted only § 841(b)(1)(B)(v) and not § 841(b)(1)(A)(v). The two provisions, however, are nearly identical and only differ in what number of grams of LSD will result in what minimum sentence. No reason exists to interpret them differently, and Neal has not suggested that we do this.

4. Neal suggests that the per dose calculation, in assigning a presumptive weight of 0.4 milligrams per dose of LSD (a presumptive weight of 0.05 milligrams to the pure LSD dosage and 0.35 milligrams to the carrier), does "assign some weight to the carrier medium" and is therefore an appropriate interpretation of *Chapman*. Such a reading conflicts with the language of *Chapman* ("So long as it contains a detectable amount, the entire mixture or substance is to be weighed when calculating the sentence.") and is an untenable reinterpretation that the Commission neither adopted nor could have adopted.

5. For the defendant in *Chapman*, the number of doses triggering the mandatory minimum five-year imprisonment would have been about 175. *See Chapman*, 500 U.S. at 455–56, 111 S.Ct. at 1922–23. A defendant responsible for between 125 doses and 250 doses of LSD is eligible for imprisonment of only one-half the specific guideline range, followed by supervised release with a condition of community confinement or home detention. U.S.S.G. § 5C1.1, comment (n. 4).

Cir.1994); *United States v. Boot*, 25 F.3d 52 (1st Cir.1994); *United States v. Richardson*, 866 F.Supp. 1376 (S.D.Ala.1994); *United States v. Bugella*, 861 F.Supp. 77 (M.D.Fla. 1994); *United States v. Pirnat*, 859 F.Supp. 905 (E.D.Va.1994); *United States v. Kinder*, 853 F.Supp. 122 (D.Ver.1994); *see also United States v. Smith*, 39 F.3d 1143, 1146 n. 2 (11th Cir.1994) (noting but declining to address issue); *United States v. Staufer*, 38 F.3d 1103, 1108 n. 2 (9th Cir.1994) (same). A panel of the Eighth Circuit did issue an opinion contrary to this line of cases, *United States v. Stoneking*, 34 F.3d 651 (8th Cir. 1994), but that opinion was vacated pending rehearing *en banc*. 1994 WL 601482 (8th Cir. September 16, 1994). We see no occasion here to depart from the reasoned opinions of these courts and thereby create a circuit split.

III.

Congress has declined to follow a single approach to federal sentencing policy. In most cases, a defendant's sentence will be determined under the generally applicable Guidelines scheme which increases a defendant's sentence in rough proportion to the severity of the crime. For a few select classes of criminals (most notably, repeat offenders and large-scale drug dealers), however, Congress has enacted more stringent mandatory minimum sentences that abruptly depart from the Guidelines regime. By enhancing the punishment for distributing larger amounts of drugs (and by including the carrier medium in the computation of the quantity of drugs attributed to the defendant), Congress acted within its province. The Guidelines amendment creating a presumptive weight for purposes of calculating a defendant's base offense level, in effect, cuts small scale dealers a break by making them eligible for shorter sentences, and even probation. However, as the Commentary made clear, the amendment did not (and, in our view, could not) trump the statutory mandatory minimum provisions. Under *Stinson v. United States*, — U.S. —, —, 113 S.Ct. 1913, 1919, 123 L.Ed.2d 598 (1993), the Commission may reconcile conflicting judicial interpretations of the Guidelines by clarifying the Guidelines, as it did through Amendment 488. However, nothing in *Stinson* suggests that a Guidelines amendment can resolve a conflict between the Guidelines and a statute with respect to the meaning of a statutory term. The Supreme Court has authoritatively construed the term at issue in this case, and, in the absence of either Congressional amendment or clarification of the statute or a reinterpretation of the relevant language by our judicial superiors, we, like the Commission, are bound by *Chapman* for the purpose of applying the mandatory minimum scheme. The district court properly applied the Sentencing Guidelines.

AFFIRMED.

RIPPLE, Circuit Judge, with whom CUMMINGS and ROVNER, Circuit Judges, join, dissenting.

This case presents a straightforward task that ought to be easily accomplished—the sentencing of a person who has been convicted of distributing LSD. Several provisions of law must be considered. However, the harmonization of those provisions is quite a bit less complicated than the circuitous approach taken by the majority. The judiciary has an obligation to presume that those who sit in the Congress intend that the country be governed by a sentencing system that, although composed of both mandatory minimum sentences and the guideline ranges, operates as an integrated and fair system of criminal justice.

The sections that follow first set forth the approach to sentencing LSD offenders now sanctioned by the Congress and explain why that approach is supported by well-established principles. Finally, the legal and practical infirmities inherent in the approach now adopted by the majority are addressed.

A.

In determining the appropriate sentencing methodology, we must begin with the statute. Section 841(a) of Title 21 proscribes the distribution of certain substances, including LSD. Section 841(b)(1)(B)(v) establishes a mandatory minimum sentence for a conviction of distribution of certain amounts of a

"mixture or substance" containing "a detectable amount" of LSD.

Pursuant to its statutory authority to set sentencing ranges for the distribution of contraband substances, including LSD, the United States Sentencing Commission has set a range of terms of imprisonment for violations of the statute. These terms of imprisonment are correlated to the weight of the controlled substance. Therefore, U.S.S.G. § 2D1.1(c), the Drug Quantity Table of the Guidelines, establishes sentencing ranges for narcotics violations of § 841; the length of a sentence increases proportionally with the increased quantity of the drug in question. In the case of LSD in a carrier medium, the Sentencing Commission, through a recent revision ("Amendment 488"), has set the range of sentences so that each dose of LSD has a presumptive weight of 0.4 mg. In the "Background" Commentary to § 2D1.1 that accompanies this recent revision, the Commissioners noted that the weights of carrier media differ widely. In order to avoid the injustice of disparate sentences caused solely by the varying weight of different carrier media used by different defendants, the Commission selected a fixed weight to ensure against unwarranted disparity in sentences. The Commission also noted that assigning a fixed weight to the medium was necessary to ensure that those convicted of distributing LSD were not treated unfairly in comparison to defendants convicted of distributing other contraband substances even more dangerous than LSD.

In selecting 0.4 mg, the Commissioners noted that this weight exceeded the standard dosage unit of 0.05 mg for pure LSD calculated by the Drug Enforcement Administration. It justified that higher weight on the ground that justice required that a carrier medium be calculated evenhanded into the sentencing determination. The Commission gave two reasons for this inclusion of the carrier medium: (1) The weight most controlled substances in the Drug Quantity Table includes the amount of a carrier medium; (2) In *Chapman v. United States*, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991), the Supreme Court interpreted the statutory section imposing a mandatory minimum sentence for the distribution of a single gram or more of a mixture or substance containing LSD to require the inclusion of the carrier medium within the weight calculation. Therefore, in promulgating this method of calculating the weight of LSD in Amendment 488 after the Supreme Court's decision in *Chapman*, the Commission expressly addressed the need to comply with the Supreme Court's interpretation of the statute in *Chapman*. Congress, having been explicitly advised of this change and of the Commission's interpretation of the Supreme Court's reading of the statute, took no action to countermand the Commission's promulgation. Therefore, the Sentencing Guideline's § 2D1.1(c), as revised by Amendment 488, is consistent with 21 U.S.C. § 841(b). It fully takes into account the Supreme Court's interpretation of § 841(b) in *Chapman* with respect to the mandatory minimum sentence provision. Accordingly, it should govern the weight calculations of controlled substances for sentencing determinations.[1]

1. The following Circuits have addressed the issue in holding or dictum:
First Circuit: *United States v. Dimen*, 28 F.3d 240, 241 (1st Cir.1994) (noting that a reduction in the mandatory minimum sentence would be inconsistent with the Commission's statement that Amendment 488 did not override "the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence."); *United States v. Boot*, 25 F.3d 52, 55 (1st Cir. 1994) (stating that "Congress simply acquiesced in the restrictive reach of Amendment 488 duly noted by the Commission").
Fifth Circuit: *United States v. Perdue*, 36 F.3d 429, 431 (5th Cir.1994) (per curiam) (focusing on the "does not override" language in the Background Commentary to § 2D1.1(c) and finding that this language "leads to the inescapable conclusion that the mandatory minimum of § 84 calculated according to *Chapman*, overrides retroactive application of the new guideline
Sixth Circuit: *Cox v. United States*, No. 94-30 1994 WL 443250, at *2, 1994 U.S.App. Lx 22188, at *4 (6th Cir.1994) (unpub. order) (fin ing that district court's refusal to order senter below mandatory minimum "finds support in plain language" of guideline § 5G1.1(b) and Background Commentary to § 2D1.1).
Seventh Circuit: *United States v. Sazzi*, 33 F 56, 1994 U.S.App. Lexis 22932 (7th Cir.19 (unpub. order) (citing *Boot* and "does not override" language of the Background Comment and noting that Commission had not overrid

B.

In stark contrast to the Commission's attempt, with the approval of the Congress, to maintain fairness in sentencing, the majority adopts an alternate approach, the so-called "dual weight" system of calculating LSD weight. Under that approach, a sentencing court first must use the actual weight of the controlled substance combined with its medium to determine whether the offender requires the mandatory minimum sentence. If the offender does not fall off the "cliff" and incur the mandatory minimum sentence, the court must then recalculate the sentence on the basis of the presumptive weight.

The majority suggests that this approach is consistent with the revised Guidelines. To support this assertion, it depends, without any heed to context, on an interpretation of two sentences of the revised guideline commentary. It first notes, adding its own emphasis, that the Commission wrote that the presumptive weight was established "*for purposes of determining the base offense level.*" Opinion at 1408 (emphasis supplied). It then quotes, again adding its own emphasis: "'[T]his approach *does not override* the applicability of "mixture or substance" for the purpose of applying any mandatory minimum sentence.'" *Id.* (emphasis supplied). Reading these two sentences in isolation and with the assistance of its own emphasis, the majority concludes that the Sentencing Commission intended, and the Congress agreed, that the determination of whether the mandatory minimum sentence was required would be made without reference to the weight established by the revised guideline.[2] However, these isolated selections make a great deal more sense when they are read in the context of the entire explanation given in the paragraphs above those sentences.[3] Read in

Chapman), *petition for cert. filed.* (Nov. 21, 1994) (No. 94-7094).
Eighth Circuit: *United States v. Saowaking*, 34 F.3d 651 (8th Cir.1994) (rejecting dual weight analysis in favor of uniform application of presumptive weight), *vacated*, 1994 WL 601482, 1994 U.S.App. Lexis 30466 (8th Cir. Sept. 16, 1994) (ordering rehearing en banc and scheduling argument for December 6, 1994).
Tenth Circuit: *United States v. Mueller*, 27 F.3d 494, 496-97 (10th Cir.1994) (concluding, in a case in which the defendant had received a reduction below the applicable mandatory minimum sentence pursuant to Fed.R.Crim.P. 35, that the defendant was not entitled to any further reductions because he was subject to a mandatory minimum at the time he was sentenced, but failing to analyze whether Amendment 488 could be read in harmony with the Supreme Court's decision in *Chapman*).

Two Circuits have reserved ruling on the question:

Ninth Circuit: *United States v. Staufer*, 38 F.3d 1103, 1108 n. 2 (9th Cir.1994) ("We express no view as to the effect of the Amendment [488] on the calculation of the mandatory minimums in light of the Supreme Court's decision in *Chapman v. United States*[.]").
Eleventh Circuit: *United States v. Smith*, 39 F.3d 1143, 1146 n. 2 (11th Cir.1994) ("We express no opinion as to whether the drug quantity determination at sentencing is to be governed by the recent amendment to the sentencing guidelines ... or by the rule set down by the Supreme Court in *Chapman*.").

2. The opinion of the First Circuit in *Boot* focuses on the second of these sentences and claims that it alone is relevant: "Without more—and there is no more[,]" *Boot*, 25 F.3d at 33. But, as the following footnote demonstrates, there is a great deal more.

3. Amendment 488 provided, in pertinent part, that:

> The Commentary to § 2D1.1 captioned "Application Notes" is amended by inserting the following additional note:
> "18. LSD on a blotter paper carrier medium typically is marked so that the number of doses ('hits') per sheet readily can be determined. When this is not the case, it is to be presumed that each ¼ inch by ¼ inch section of the blotter paper is equal to one dose. In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.".
> The Commentary to § 2D1.1 captioned "Background" is amended by inserting the following paragraphs at the end:
> "Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

context, these sentences summarize the goals accomplished by the Commission in the amendment: (1) It harmonized offense levels for different controlled substances; (2) It lessened the "undue influence" that different carrier weights would have on the offense level; and (3) It took into account *Chapman*'s interpretation of the terms "mixture or substance" when applying a mandatory minimum sentence.

> The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (*i.e.*, the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in *Chapman v. United States*, [500 U.S. 453,] 111 S.Ct. 1919, [114 L.Ed.2d 524] (1991) (holding that the term 'mixture or substance' in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence (see *Chapman*; § 5G1.1(b)).".
> The Commission has found that the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself (*e.g.*, LSD is typically placed on blotter paper which generally weighs from 5 to 10 milligrams per dose; the weight of the LSD itself per dose is generally from 0.02 to 0.08 milligram; the Drug Enforcement Administration describes a standard dose of LSD as containing 0.05 milligram of LSD). As a result, basing the offense level on the entire weight of the LSD and carrier medium produces unwarranted disparity among offenses involving the same quantity of actual LSD but different carrier weights, as well as sentences that are disproportionate to those for other, more dangerous controlled substances, such as PCP, heroin, and cocaine. Under the guidelines prior to the amendment, for example, 100 grams of heroin or 500 grams of cocaine (weights that correspond to several thousand doses, the number depending upon the purity) result in the same offense level as 125 doses of LSD on blotter paper (which has an average weight of 8 milligrams per dose); or 1 dose of LSD on a sugar cube (2000 milligrams per dose). Consequently, in cases involving LSD contained in a carrier medium, this amendment establishes a weight per dose of 0.4 milligram to be used for purposes of determining the base offense level. The dosage weight of LSD selected by the Commission exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (*i.e.*, the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in *Chapman v. United States*, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP (for example, 2000 doses of LSD at 0.5 milligram per dose equals 1 gram of LSD—corresponding to the lower limit of offense level 26; similarly, 2000 doses of PCP at 5 milligrams per dose, the standard amount of actual PCP in a dose, equals 10 grams of actual PCP—corresponding to the lower limit of offense level 26). Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the definition of mixture or substance for purposes of applying any mandatory minimum sentence (see *Chapman*; § 5G1.1(b)). The effective date of this amendment is November 1, 1993. ...

Any lingering doubt as to the appropriate reading of the guideline commentary ought to be dispelled by an examination of the practical effect of the majority's interpretation. Under the "dual weight" method of calculation, an LSD trafficker would receive

the mandatory minimum sentence of five years for one gram or more of LSD by selling LSD in approximately one-half of a sugar cube or 125 blotter paper squares. *See* U.S.S.G. amend. 488 (noting that average weights of sugar cube and blotter square are 2000 mg and 8 mg, respectively); *cf. Chapman*, 500 U.S. at 458 n. 2, 111 S.Ct. at 1924 n. 2 (reproducing chart in which weights of various carrier media are listed; using these weights, a dealer could qualify for the five-year mandatory minimum by selling LSD in approximately one-half of a sugar cube, 72 blotter paper squares, or 445 gelatin capsules). By contrast, under the Sentencing Commission's method, whether an LSD trafficker receives the five-year mandatory minimum sentence will not depend on the type of medium he happens to use but on the number of doses he sells.

We ought not attribute to the Commission or to the Congress the injustice produced by the majority's interpretation. Until today, we have acknowledged that, although Congress has chosen to address sentencing policy issues through both statutes and sentencing guidelines, courts ought not presume lightly that it intended these two vehicles of the legislative will to work at odds with each other. Indeed, with respect to mandatory minimum sentences, we have explicitly noted that Congress did not intend to employ through the mandatory minimum sentence a scheme "so completely at odds with the measured approach required by the Guidelines." *United States v. Young*, 997 F.2d 1204, 1210 (7th Cir.1993); *see also United States v. Martinez*, 987 F.2d 920, 926 (2d Cir.1993) (same); *cf. United States v. Edwards*, 945 F.2d 1387, 1396 (7th Cir.1991) (explaining that "the limiting principle [of conspiracy liability] underlying conspiracy law and the Guidelines is essentially one and the same"), *cert. denied*, — U.S. —, 112 S.Ct. 1590, 118 L.Ed.2d 308 (1992). Here, the Sentencing Commission established a methodology for attributing a weight to the dose of LSD that took into account, as the statute setting the mandatory minimum requires, the weight of the carrier medium. It therefore harmonized its setting of graduated, weight-based sentences with the command of the mandatory statute. Congress has had the opportunity to scrutinize and approve the Commission's work.[4] After the amended § 2D1.1 was sent to Congress for review, it took effect without modification or delay, and hence with congressional approval, in November 1993. We ought not presume that the Congress was derelict in its duty to scrutinize the workproduct of the Commission. We certainly ought not assume that Congress has made conflicting policy decisions, especially when those decisions can be so easily reconciled.

Nor is it appropriate to lay the blame for the result reached today on the doorstep of the Supreme Court. *Chapman* does not require the result reached by the majority. In *Chapman*, the Supreme Court was asked to decide whether eligibility for the mandatory minimum sentence under 21 U.S.C. § 841(b) was to be determined by the weight of the pure LSD or of the carrier medium containing the LSD. It held that the mandatory minimum statute "requires the weight of the carrier medium to be included when determining the appropriate sentence for trafficking in LSD." 500 U.S. at 468, 111 S.Ct. at 1929. The Supreme Court was presented with only two choices in *Chapman*: to count either the infinitesimal weight of the pure LSD contained in a dose or the entire weight of the dose and the blotter paper. Faced with that choice, and in keeping with the market-oriented approach adopted by the Guidelines, the Court could only choose the weight of the pure drug and its carrier. Two years later, the Sentencing Commission, acknowledging *Chapman*, amended § 2D1.1. It assigned a standard dosage weight of 0.05 mg to a unit of pure LSD and a weight of 0.35 mg to the carrier medium in order to "harmonize offense levels" for different controlled substances and to balance the influence that different carrier weights would have on the applicable offense level for an LSD offense. This approach, explained the Commission, is faithful to the holding of *Chapman*. U.S.S.G. § 2D1.1, comment. (backg'd.). Amendment 488 simply assigns a rational and uniform weight to that portion of

4. *See* 28 U.S.C. § 994(p).

the carrier that can be said to be bonded or mixed with the drug. The amendment therefore satisfies *Chapman*'s interpretation of the mandatory minimum statute that the weight assigned to the LSD include the weight of the carrier medium. It retains the "market-oriented" approach, under which the total quantity of drugs distributed, rather than the amount of pure drug sold, is used to determine the length of the sentence. By assigning a weight per dose that is eight times the actual weight of the pure drug, the Sentencing Commission has determined, in effect, that 0.05 mg of LSD can be absorbed in a carrier eight times its weight. Thus, Amendment 488 remains true to the *Chapman* mandate that the weight of the carrier must be included if the carrier can be said to be bonded with or mixed with the drug. At the same time, it promotes the sentencing uniformity that has been at the heart of the Congress' effort to achieve sentencing reform. Years of incarceration and thousands of public dollars to support that incarceration ought not depend on whether the drug trafficker used blotter paper or sugar cubes as a medium.

The amendment was a refinement of the earlier practice of weighing on an ad hoc basis whatever carrier the defendant happened to use. Such a refinement of the sentencing scheme through the action of the Commission, with the knowledge and the consent of the Congress, is an expected and necessary part of the process contemplated by the present sentencing scheme. As the Supreme Court recently noted:

> Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest.

Stinson v. United States, — U.S. —, —, 113 S.Ct. 1913, 1919, 123 L.Ed.2d 598 (1993) (quoting *Braxton v. United States*, 500 U.S. 344, 348, 111 S.Ct. 1854, 1858, 114 L.Ed.2d 385 (1991)). The Sentencing Commission has interpreted properly the Supreme Court's requirement that the carrier weight be included. By stating that its "approach does not override the applicability of mixture or substance for the purpose of applying any mandatory minimum sentence," the Commission has recognized the continued viability of the mandatory minimum sentence whenever the weight of the LSD is calculated by the method stated in § 2D1.1. Congress did not challenge that revision. It is this court's responsibility to read the statutory sentencing provisions and the Guidelines as a consistent whole that expresses the intent of the Congress. *See United States v. Young*, 34 F.3d 500, 506 (7th Cir.1994). The sentence ought to be vacated and the case remanded for resentencing.

LANDSCAPE PROPERTIES, INC., Debtor in Possession, Appellant,
v.
Robert A. VOGEL, Richard C. Downing, Joe D. Whisenhunt, Appellees,
Wingfield Martin; Milton T. Schaeffer, Defendants.

No. 94-1234.

United States Court of Appeals, Eighth Circuit.

Submitted Nov. 16, 1994.

Decided Feb. 2, 1995.

Chapter 7 trustee brought damages action alleging collusion among bidders at bankruptcy sale. The United States District Court for the Eastern District of Arkansas, Stephen M. Reasoner, Chief Judge, dismissed complaint. Trustee appealed. The Court of Appeals, 970 F.2d 471, reversed and remanded. On remand, after conversion of case to Chapter 11, the District Court entered judgment on jury verdict in favor of bidders. Chapter 11 debtor in possession appealed. The Court of Appeals, Friedman, Senior Circuit Judge, sitting by designation,

FILED

UNITED STATES DISTRICT COURT
Central District of Illinois

MAR 2 9 1994

JOHN M. WATERS, Clerk
U. S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA

v. Case Number CR 88-30020

MEIRL GILBERT NEAL
Defendant.

AMENDED
Judgment of 6/19/89 is Vacated.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Resentencing upon amendments to sentencing guidelines:

The defendant, MEIRL GILBERT NEAL, was represented by Michael Costello.

The defendant pleaded guilty to count(s) 1 & 2. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 846	Conspiracy to Distribute and Distribution of LSD	3/17/88	1
21 USC 841(a)(1)	Possession with Intent to Distribute LSD	3/17/88	2

As pronounced on 3/28/94, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 29th day of March, 1994.

Richard Mills
United States District Judge

APPENDIX B

Defendant's SSAN: 354-32-7547
Defendant's Date of Birth: 11/11/40
Defendant's address: c/o U.S. Marshal; 600 E. Monroe; Springfield, IL 62701

APPENDIX B

Defendant: MEIRL GILBERT NEAL
Case Number: CR 88-30020

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 120 months on each court to run concurrently.

The defendant is remanded to the custody of the United States Marshal.

The defendant is given credit for time served.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: MEIRL GILBERT NEAL
Case Number: CR 88-30020

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own or possess a firearm, ammunition, or destructive device.

4. The defendant shall participate in a substance abuse program, which may include urinalysis at the direction of, and in the discretion of the U.S. Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except: (see attachment, if necessary)

OR

☐ The court adopts the factual findings and guideline application from the Plea Agreement and information presented at the sentencing hearing. The court finds, pursuant to Federal Rule of Criminal Procedure 32(c)(1), that there is sufficient information in the record to waive the presentence report.

Guideline Range Determined by the Court:

Total Offense Level: 25
Criminal History Category: III
Imprisonment Range: 70 to 87 months; Mand. Min. 120 months
Supervised Release Range: 3 to 5 years; Statutory Term __ years
Fine Range: $10,000 to $8,000,000

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

☐ Community service in lieu of fine.

Restitution: $ 1,460

☐ Full restitution is not ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): punishment and deterrence.

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

Dated this 29th day of March, 1994

Richard Mills
RICHARD MILLS
United States District Judge

AO 245 S (3/88) Sheet 1 - Judgment Including Sentence Under the Sentencing Reform Act

FILED
JUN 19 1989
JOHN M. WATERS, Clerk
U. S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

United States District Court

CENTRAL District of ILLINOIS

UNITED STATES OF AMERICA

V.

MEIRL GILBERT NEAL

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 88-30020-01

(Name of Defendant)

Michael Costello
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 and 2 .
☐ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
T. 21, Sec. 846	Conspiracy to Distribute and Distribution of LSD (10 Grams or More)	1
T. 21, Sec. 841(a)(1)	Possession With Intent to Distribute LSD (10 Grams or More)	2

The defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☒ It is ordered that the defendant shall pay to the United States a special assessment of $ 100.00 , which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
354-32-7547

Defendant's mailing address:
937 N. Indiana Street
Springfield, IL 62702

Defendant's residence address:
937 N. Indiana Street

JUNE 19, 1989
Date of Imposition of Sentence

Signature of Judicial Officer

RICHARD MILLS, U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

JUNE 19, 1989
Date

APPENDIX C

AO 245 S (3/88) Sheet 2 - Imprisonment

Defendant: MEIRL GILBERT NEAL
Case Number: 88-30020-01

Judgment—Page 2 of 7

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 192 months on each Count, to run concurrently.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.
☒ The defendant shall surrender to the United States Marshal for this district,

☒ at 1:30 ~~a.m.~~ p.m. on June 26, 1989 .

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

United States District Court

FILED
JUN 19 1989
JOHN M. WATERS, Clerk
U. S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

CENTRAL District of ILLINOIS

UNITED STATES OF AMERICA

V.

MEIRL GILBERT NEAL

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 88-30020-01

(Name of Defendant)

Michael Costello
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 and 2.
☐ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
T. 21, Sec. 846	Conspiracy to Distribute and Distribution of LSD (10 Grams or More)	1
T. 21, Sec. 841(a)(1)	Possession With Intent to Distribute LSD (10 Grams or More)	2

The defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☒ It is ordered that the defendant shall pay to the United States a special assessment of $ 100.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
354-32-7547

JUNE 19, 1989
Date of Imposition of Sentence

Defendant's mailing address:
937 N. Indiana Street
Springfield, IL 62702

Signature of Judicial Officer

RICHARD MILLS, U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

Defendant's residence address:
937 N. Indiana Street

JUNE 19, 1989
Date

APPENDIX C

Defendant: MEIRL GILBERT NEAL
Case Number: 88-30020-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 192 months on each Count, to run concurrently.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.
☒ The defendant shall surrender to the United States Marshal for this district,

☒ at 1:30 p.m. on June 26, 1989.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: MEIRL GILBERT NEAL
Case Number: 88-30020-01

PROBATION

The defendant is hereby placed on probation for a term of _____.

While on probation, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this Judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

Defendant: MEIRL GILBERT NEAL
Case Number: 88-30020-01

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;
2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5) the defendant shall support his or her dependents and meet other family responsibilities;
6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

Defendant: MEIRL GILBERT NEAL
Case Number: 88-30020-01

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $ _____ , consisting of a fine of $ _____ and a special assessment of $ _____ .

☐ These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

This sum shall be paid ☐ immediately.
☐ as follows:

☐ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

Defendant: MEIRL GILBERT NEAL
Case Number: 88-30020-01

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

Title 21 U.S.C. § 841(b)(1)(A)(v)

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:. . .

(1)(A) In the case of a violation of subsection (a) of this section involving-. . .

> (v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);. . .

such a person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provision of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both.

APPENDIX E

U.S.S.G. § 2D1.1(c)

§ 2D1.1(c) is amended in the notes following the Drug Quantity Table by inserting the following additional paragraph at the end:

> In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table."

The Commentary to Sec. 2D1.1 captioned "Application Notes" is amended by inserting the following additional note:

> LSD on a blotter paper carrier medium typically is marked s that the number of doses ("hits") per sheet readily can be determined. When this is not the case, it is to be presumed that each 1/4 inch by 1/4 inch section of the blotter paper is equal to one dose.
>
> In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted."

The Commentary to Sec. 2D1.1 captioned "Background" is amended by inserting the following paragraphs at the end:

> Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.
>
> The dosage weight of LSD selected exceeds the Drug Enforcement Administrations's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard t purity, and (B) the decision in Chapman v. United States, 111 S.Ct. 1919 (1991) (holding that the term "mixture of substance" in 21 U.S.C. Sec. 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose

a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent t those for PCP (for example, 2000 doses of LSD at 0.5 milligram per dose equals 1 gram of LSD - corresponding to the lower limit of offense level 26; similarly, 2000 doses of PCP at 5 milligrams per dose, the standard amount of actual PCP in a dose,equals 10 grams of actual PCP - corresponding to the lower limit of offense level 26). Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the definition of mixture or substance for purposes of applying any mandatory minimum sentence (see Chapman; Sec. 5G1.1(b)).

a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent t those for PCP (for example, 2000 doses of LSD at 0.5 milligram per dose equals 1 gram of LSD - corresponding to the lower limit of offense level 26; similarly, 2000 doses of PCP at 5 milligrams per dose, the standard amount of actual PCP in a dose,equals 10 grams of actual PCP - corresponding to the lower limit of offense level 26). Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the definition of mixture or substance for purposes of applying any mandatory minimum sentence (see Chapman; Sec. 5G1.1(b)).

ORIGINAL

94-8068

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No._____

Supreme Court, U.S.
FILED
MAY 2 1995
OFFICE OF THE CLERK

MEIRL GILBERT NEAL, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PROOF OF SERVICE

I, Michael J. Costello, do swear or declare that on this date, May 1, 1995, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepared:

The names and addresses of those served are as follows:

Byron Cudmore
Assistant U.S. Attorney
Federal Building
600 East Monroe
Springfield, Illinois 62701

Solicitor General
Department of Justice
Washington, D.C. 20530

MICHAEL J. COSTELLO

Subscribed and sworn to before me this 1st day of May, 1995.

NOTARY PUBLIC

OFFICIAL SEAL
ANGELIA D. JOOS
NOTARY PUBLIC - STATE OF ILLINOIS
My Commission Expires December 12, 1997

RECEIVED
MAY 2 1995
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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

NO._____

MEIRL GILBERT NEAL, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

STATEMENT OF FILING BY MAIL PURSUANT TO SUPREME COURT RULE 28.2

The undersigned, Michael J. Costello, Attorney at Law, and a member of the Bar of this Court, under oath, states that he filed, within the time prescribed, the above-captioned Petition for Writ of Certiorari and Motion for Leave to File In Forma Pauperis, by mailing same in an envelope, first-class mail, postage prepaid, and depositing same in the United States Post Office, 600 West Monroe, Springfield, Illinois 62701, addressed to:

Clerk of the Supreme Court
of the United States
1 First Street, N.E.
Washington, D.C. 20543

this 1ST day of May, 1995.

Michael J. Costello

STATE OF ILLINOIS)
) ss
COUNTY OF SANGAMON)

SUBSCRIBED AND SWORN to before me this 1ST day of May, 1995.

OFFICIAL SEAL
ANGELIA D. JOOS
NOTARY PUBLIC - STATE OF ILLINOIS
Commission Expires December 12, 1997

NOTARY PUBLIC

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing document was served on the following by enclosing same in an envelope addressed as shown and by depositing said envelope in the United States Mail in Springfield, Illinois on this 1ST day of May, 1995:

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Assistant U.S. Attorney
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ORIGINAL

No. 94-9088

Supreme Court, U.S.
FILED
MAY 31 1995
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

MEIRL GILBERT NEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

KRISTINA L. AMENT
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the weight assigned to a dosage unit of LSD by the Sentencing Commission for purposes of calculating a defendant's offense level under Sentencing Guidelines § 2D1.1 governs the determination of the weight of the "mixture or substance" containing LSD for purposes of applying the mandatory minimum sentencing provisions of 21 U.S.C. 841(b).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-9088

MEIRL GILBERT NEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court is reported at 846 F. Supp. 1362. The opinion of the court of appeals (Pet. App. A1405-A1416) is reported at 46 F.3d 1405.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1995. The petition for a writ of certiorari was filed on May 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Central District of Illinois, petitioner was convicted of

possession of lysergic acid diethylamide (LSD) with intent to distribute it, in violation of 21 U.S.C. 841, and conspiracy to possess LSD with intent to distribute it, in violation of 21 U.S.C. 846. On his motion for reduction of sentence made pursuant to 18 U.S.C. 3582(c)(2), petitioner was sentenced to 120 months' imprisonment, the mandatory minimum term required by 21 U.S.C. 841(b)(1)(A)(v), to be followed by five years' supervised release. The court of appeals affirmed.

1. In a series of transactions that took place in February and March of 1988, petitioner sold LSD to an undercover agent of the Illinois State Police and a confidential source working with the police. All of the LSD sold was carried on blotter paper. See Original Presentence Report (PSR) 8-13 (May 9, 1989). The narcotics sold contained 11,456 dosage units of LSD. See Updated PSR 3 (Mar. 4, 1994). The total net weight of the LSD purchased from petitioner, including the weight of the blotter paper, was 109.51 grams. Original PSR 13.

Because the total net weight of the LSD, including the blotter paper, exceeded ten grams, petitioner was subject to a mandatory minimum sentence of ten years' imprisonment under 21 U.S.C. 841(b)(1)(A)(v), which imposes a ten-year sentence for offenses involving ten grams or more of a "mixture or substance" containing LSD. See Chapman v. United States, 500 U.S. 453, 468 (1991) (21 U.S.C. 841(b) "requires the weight of the carrier medium to be included when determining the appropriate [mandatory minimum] sentence for trafficking in LSD").

Furthermore, under the version of Sentencing Guidelines § 2D1.1 in effect at the time of his sentencing (June 19, 1989), an offense involving more than 100 grams of LSD yielded a base offense level of 36. Petitioner received a reduction in his offense level of two points, to 34, for acceptance of responsibility. Original PSR 14-15. Because petitioner had prior convictions, he was in criminal history category III, and his Guidelines sentencing range was 188 to 235 months' imprisonment. See id. at 17-18. The district court sentenced him to 192 months' imprisonment.

2. On November 1, 1993, the Sentencing Commission amended Guidelines § 2D1.1(c) through amendment 488 to provide:

> In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.

Guidelines § 2D1.1(c) n.*. The Commission also amended the background to the commentary on Section 2D1.1 to explain that its approach "harmonize[d] offense levels for LSD offense levels with those for other controlled substances and avoid[ed] an undue influence of varied carrier weight on the applicable offense level." Guidelines § 2D1.1, commentary (background). The Commission further explained, however, that its "approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence." Ibid. (citing Chapman v. United States, 500 U.S. 453 (1991), and Guidelines § 5G1.1(b)). The Commission also amended Guidelines §

1B1.10(d) to permit retroactive application of amendment 488. Guidelines § 1B1.1(d) (Policy Statement); U.S. Sentencing Comm'n, Guidelines Manual, App. C, amend. 502 (Nov. 1, 1993).

3. On December 10, 1993, petitioner filed a motion to modify his sentence, invoking the retroactive application of the new version of Guidelines § 2D1.1. He contended that the weight of the LSD, as calculated by the new version of Guidelines § 2D1.1, was only 4.58 grams, and therefore he was no longer subject to the ten-year mandatory minimum sentence for offenses involving 10 grams or more of LSD. An updated version of his PSR concluded that, under the new Guidelines, his offense level was 25, which yielded a Guidelines sentencing range of 70 to 87 months. See Updated PSR 4-5.

The district court concluded that petitioner was still subject to the ten-year mandatory minimum sentence. The court noted that the background commentary to the amendment to Guidelines § 2D1.1 stated that the Commission did not intend to overrule this Court's decision in Chapman for the purpose of applying "any mandatory minimum sentence." See Dist. Ct. Op. 3, 846 F. Supp. at 1363. The court thus concluded that "the mandatory minimum sentence of 12 months mandated by 21 U.S.C. §841(b)(1)(A)(v) supersedes [petitioner's] revised guideline range of 70 to 87 months." Ibid. The court did, however, reduce petitioner's sentence to 120 months, since the Guidelines no longer required a sentence in excess of the mandatory minimum level.

4. The court of appeals, sitting en banc, affirmed. Pet. App. A1405-A1416. The court acknowledged that, "[u]nder the district court's interpretation of federal law, a single amount of LSD is assigned two different weights for sentencing purposes: one weight for determining the base offense level under the Guidelines and another weight for determining eligibility for the mandatory minimum sentences provided in 21 U.S.C. § 841(b)(1)(A)(v)." Id. at A1408. The court nonetheless concluded that the district court's interpretation was correct, for the post-amendment commentary to Guidelines § 2D1.1 "clearly indicates that the Commission promulgated Amendment 488 in full recognition that it would create a 'dual weight' system of calculating the weight of LSD for sentencing purposes." Ibid. The court observed that, "[e]ven if an amendment to the Sentencing Guidelines could super[s]ede the Supreme Court's interpretation of a sentencing statute, [the Guidelines commentary] make[s] clear that the amendment to § 2D1.1. purported to do no such thing." Id. at A1409. The court also ruled that Chapman must continue to govern the application of the mandatory-minimum statute because "[t]he Commission is without authority to override Chapman. * * * [as the Sentencing Commission has] only the power to guide judicial discretion within the statutory limits." Ibid.

The court rejected petitioner's arguments based on due process and the rule of lenity. The court concluded that the dual-weight scheme has a rational basis: "[T]hose who deal more

LSD will be punished more heavily than those who deal less, and at a certain point there is a qualitative leap in the seriousness of the deed that will give rise to a sudden rather than an incremental increase." Pet. App. A1410. The court further concluded that the rule of lenity was not applicable to this case because there is no ambiguity in the sentencing structure set up by Congress and the Sentencing Commission. Ibid.

Judge Ripple, joined by Judges Cummings and Rovner, dissented. The dissent concluded that the amended version of Guidelines § 2D1.1 does take into account the weight of the carrier medium by assigning a fixed, uniform weight to carrier media, and that the amended Guideline therefore "is consistent with 21 U.S.C. § 841(b) [and] fully takes into account the Supreme Court's interpretation of § 841(b) in Chapman." Pet. App. A1412. Because, in the dissent's view, "Amendment 488 remains true to the Chapman mandate that the weight of the carrier must be included" (id. at A1416), the dissent would have held the amended version of Guidelines § 2D1.1 applicable to the mandatory-minimum statute as well.

DISCUSSION

Petitioner renews his contention that the weight assigned to a dosage unit of LSD by the Sentencing Commission for purposes of Guidelines § 2D1.1 also governs the determination of the weight of a "mixture or substance" containing LSD under 21 U.S.C. 841(b). Although the court of appeals correctly rejected that contention, we agree with petitioner that the issue warrants

review by this Court. There is now a conflict among the courts of appeals on the question, and, because the issue arises frequently in the lower courts, it should be definitely settled by this Court.

In Chapman v. United States, 500 U.S. 453, 468 (1991), this Court held that 21 U.S.C. 841(b) "requires the weight of the carrier medium to be included when determining the appropriate [mandatory minimum] sentence for trafficking in LSD." It is undisputed that, in this case, the combined weight of the LSD and its carrier medium exceeded ten grams. Under Chapman, therefore, petitioner was subject to a ten-year mandatory minimum sentence under 21 U.S.C. 841(b)(1)(A)(v).

As petitioner points out, if the Guidelines' new approach to the weight of dosage units of LSD is used instead of the Chapman construction of "mixture or substance," then the weight of the LSD in his case would be only 4.58 grams. Thus, if the Guidelines' approach controls the application of the mandatory-minimum sentencing statute, petitioner would not be subject to the ten-year mandatory-minimum sentence of 21 U.S.C. 841(b)(1)(A)(v), although he would still be subject to the five-year mandatory-minimum sentence of 21 U.S.C. 841(b)(1)(B)(v), for offenses involving one gram or more of a "mixture or substance" containing LSD. Under the Sentencing Guidelines, petitioner would have an offense level of 25 and would fall within criminal history category III; his corresponding sentencing range would be 70 to 87 months' imprisonment. That range is substantially less

than the ten-year mandatory-minimum sentence required by Section 841(b)(1)(A)(v).

The en banc court of appeals concluded that the Chapman interpretation continues to govern the definition of "mixture or substance" in the mandatory-minimum sentence statutes, and that the Sentencing Commission, in amending Guidelines § 2D1.1, neither overruled Chapman for mandatory-minimum cases nor had the authority to do so. Pet. App. A1408-A1409. That decision is consistent with the decisions of the majority of the other courts of appeals that have considered the issue: like the court below, the First, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits have ruled that this Court's decision in Chapman, rather than the dosage weight assigned to LSD in Guidelines § 2D1.1(c) by amendment 488, controls the determination of the weight of LSD for the purpose of applying the mandatory minimum sentencing provisions of 21 U.S.C. 841(b). United States v. Bollwage, 47 F.3d 431 (11th Cir. 1995) (Table), petition for cert. pending, No. 94-8475; United States v. Andress, 47 F.3d 839, 840-841 (6th Cir. 1995); United States v. Thomas, 36 F.3d 1095 (4th Cir. 1994) (Table), petition for cert. pending, No. 94-8233; United States v. Pardue, 36 F.3d 429, 431 (5th Cir. 1994), cert. denied, No. 94-8025 (May 15, 1995); United States v. Dimeo, 28 F.3d 240, 241 (1st Cir. 1994); United States v. Mueller, 27 F.3d 494, 496 (10th Cir. 1994); United States v. Boot, 25 F.3d 52, 54-55 (1st Cir. 1994).

The Ninth Circuit, however, has concluded that the dosage

weight assigned to LSD in Guidelines § 2D1.1(c) does govern the determination of the weight of LSD for the purpose of applying 21 U.S.C. 841(b). See United States v. Muschik, 49 F.3d 512 (9th Cir. 1995).[1] There is therefore a conflict among the circuits on the issue presented in this petition, and little likelihood that the Ninth Circuit will reconsider its position. On May 1, 1995, the Ninth Circuit denied the government's petition for rehearing. Moreover, the Muschik panel was aware of the contrary authority in other circuits -- including the decision of the court of appeals in this case -- but it expressly rejected that authority in its opinion. See id. at 515 ("We reject the contrary result reached by the Seventh, Fifth, Tenth, and First Circuits.").

The question presented warrants the Court's review, for it concerns an important federal statute used in the prosecution of narcotics offenses. Moreover, the issue has arisen frequently. Six other petitions for a writ of certiorari currently before the Court raise the same issue. See Thomas v. United States, No. 94-8233; Bollwage v. United States, No. 94-8475; Flanagan v. United States, No. 94-8797; Kiker v. United States, No. 94-8839; Cichon v. United States, No. 94-9315; Hofer v. United States, No. 94-9312. The Court also recently denied review in two other cases raising the issue. See Pardue v. United States, No. 94-8025 (May

[1] A panel of the Eighth Circuit reached a similar conclusion, but that decision was vacated on the government's petition for rehearing and suggestion for rehearing en banc. See United States v. Stoneking, 34 F.3d 651 (8th Cir. 1994).

15, 1995); Sassi v. United States, 115 S. Ct. 1121 (1995).

This case appears to be an appropriate vehicle for resolution of the issue, for, of the seven petitions currently before the Court raising the question, this is the only one in which the issue is addressed extensively in the decision of the court of appeals. The petitions in Thomas, Bollwage, Flanagan, and Kiker all seek review of short, unpublished decisions of the courts of appeals; the decisions in Cichon and Hofer simply followed the decision below in this case. We therefore suggest that the Court grant review of the decision in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

KRISTINA L. AMENT
Attorney

MAY 1995

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

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MEIRL GILBERT NEAL, PETITIONER)
)
vs.) No. 94-9088
)
UNITED STATES OF AMERICA)

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES** by first class mail, postage prepaid, on this 31st day of May 1995.

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Drew S. Days, III/as

DREW S. DAYS, III
Solicitor General

May 31, 1995

(4)

Supreme Court, U.S.
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No. 94-9088

In The

Supreme Court of the United States

October Term, 1995

MEIRL GILBERT NEAL,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed May 2, 1995
Certiorari Granted June 19, 1995

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RELEVANT DOCKET ENTRIES

4/6/88		Magistrate Papers placed in file. File consisting of defendant information sheets, Complaint, bond papers and Waiver of Preliminary Hearing, Proceedings before U.S. Magistrate.
4/6/88	1	INDICTMENT filed. 2 counts, Summons Ordered issued. $5,000, 10% as posted.
5/6/88		ARRAIGNMENTS. Defendant Neal present with counsel Michael Costello. Defendant Harlow present with counsel Ron Stone. AUSA Byron Cudmore present for government. Defendants arraigned, advised of charges, waives reading of Indictment. Defendant Neal enters a plea of not guilty to all charges. Defendant Harlow enters a plea of not guilty to all charges. Both pleas noted of record, Counsel furnished a copy of Criminal Pre-Trial Rules. TRIAL is set for TUESDAY, JULY 5, 1988, at 9:00 a.m. Government recommends that bond continue as previously set, $5,000 10% cash posted. No objection from Defense. Bond so ordered.
5/26/88	6	SUPERCEDING INDICTMENT. 2 counts, summons to issue.
5/26/88		Bonds continue. ARRAIGNMENT set for TUEDAY [sic], JUNE 28, 1988, at 10:30.

6/28/88		ARRAIGNMENT. Defendants Meirl Neal and Lyndon Harlow present in court. AUSA Byron Cudmore present for government. Attorney Michael Costello present for defendant Neal. Attorney Stone present for defendant Harlow. Defendants arraigned; advised of charges; waive reading of not guilty; enter a plea of not guilty to charges. Pleas noted of record. Counsel furnished a copy of Criminal Pre-Trial Rules. TRIAL is set for TUESDAY, JULY 5, 1988, at 9:00 a.m. Government recommends that bond continue for both defendants as previously set. No objection from Defense. So ORDERED
12/30/88	17	(Deft. Neal) PLEA AGREEMENT.
1989		
1/4/89		(Deft. Neal) CHANGE OF PLEA set for MONDAY, FEBRUARY 13, 1989 at 1:30 p.m. JURY TRIAL set for JANUARY 4, 1989 is CANCELLED.
2/13/89		CHANGE OF PLEA. Deft. NEAL present with Atty. Michael Costello. Deft. HARLOW present with Atty. Ronald Stone. Defendants are sworn and examined by the Court. Defendants withdraw their pleas of Not Guilty and each enters a plea of Guilty to Counts 1 and 2. Plea agreements discussed. Pleas received and entered of record. Matter referred to probation for pre-sentence investigation and reports. SENTENCING for

		Deft NEAL set for MONDAY, JUNE 19, 1989 at 2:30 p.m. SENTENCING for Deft. HARLOW set for MONDAY, JUNE 26, 1989 at 9:00 a.m. Bonds continued.
6/16/89	18	(Govt.) POSITION OF THE GOVERNMENT With Respect To Sentencing Factors.
6/19/89		(Deft. NEAL) SENTENCING. Deft. NEAL present in court with Atty. Michael Costello. AUSA Byron Cudmore present for Government. Presentence report discussed. The Court adopts the PSR. Applicable Guidelines stated by the Court. Arguments of counsel heard. Statement made by Defendant. Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the deft., is hereby committed to the custody of the Bureau of Prisons for imprisonment for a term of 192 months. This consists of concurrent terms of 192 months on each count. Upon release from confinement, the defendant shall be placed on supervised release for a term of five years on each count, both counts to be served concurrently upon the following terms and conditions: 1) That the defendant not commit any local, state or federal crime; 2) That the deft. abide by the Court's standard conditions of supervised release;

3) That the defendant not possess any firearm or ammunition or other dangerous weapon; 4) That the defendant shall participate in a substance abuse program, which may include urinalysis at the direction of, and at the discretion of, the U.S. Probation Office. The defendant is ordered to pay a $100.00 Special Assessment, which shall be taken from his bond money. On motion by the Defendant, Deft. given a 7 day Stay of Execution. He shall report to the U.S. Marshal's Office, Springfield, IL on June 26, 1989 at 1:30 p.m. Motion made by Defendant for Appointment of counsel on Appeal, Motion ALLOWED. Atty. Costello appointed.

6/19/89	20	(Deft. NEAL) JUDGMENT ORDER.
6/19/89	21	(Deft. NEAL) PRE-SENTENCE REPORT. (Sealed.)
12/10/93	78	(Neal) PRO SE MOTION TO MODIFY SENTENCE PURSUANT TO 18 USC 3582(c)(2) AND RETROACTIVE AMENDMENT PERTAINING TO WEIGHT OF LSD.
1/3/94	79	ORDER. *Ergo*, the Court directs the US to file a response to the Defendant's motion by no later than 1/10/94, submitting an attached proposed order, if necessary.
1/10/94	80	(Govt) RESPONSE TO DEFENDANT'S MOTION TO MODIFY SENTENCE.

1/14/94		(Deft Neal) RESENTENCING is set for MONDAY, MARCH 28, 1994, at 9:00 a.m. (Mills, J.) D/E mailed to attorneys & Deft pro se.
1/25/94	81	(Deft Neal) PRO SE REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANTS MOTION TO MODIFY SENTENCE.
2/18/94	86	(Deft. NEAL) MOTION FOR APPOINTMENT of Counsel.
2/22/94		(Deft NEAL) Atty Michael Costello appointed by court to represent defendant Meirl Gilbert Neal as of this date.
3/28/84 [sic]	90	(Deft Neal) DEFENDANT MEIRL GILBERT NEAL'S COMMENTARY on Sentencing Factors.
3/28/94	91	(Govt) GOVERNMENT'S COMMENTARY on Sentencing Factors.
3/28/94		(Deft Neal) RESENTENCING. Deft present with Atty Michael Costello; AUSA Byron G. Cudmore present for Govt. Objections to PSR ruled on by Court. Deft is sentenced to 120 months Imprisonment on each of Counts 1 & 2 to run concurrently followed by 5 years Supervised Release with same conditions as previously ordered. Letter from prospective employer to be made part of record. Deft's oral motion to amend his commentary by interlineation is Allowed.

3/29/94	92	JUDGMENT IN A CRIMINAL CASE.
3/29/94	93	PRESENTENCE REPORT (Sealed)
3/29/94	94	PROBATION OFFICER'S SENTENCING REC. (Sealed)
3/29/94	95	OPINION. Ergo, the Defendant's sentence of imprisonment is accordingly reduced from 192 months to 120 months. All other aspects of the Defendant's original sentence remain unchanged.
4/4/94	96	NOTICE OF APPEAL.
4/4/94	97	JURISDICTIONAL STATEMENT.
5/31/94	102	TRANSCRIPT OF PROCEEDINGS, Sentencing, 3/28/94.
2/27/95	104	MANDATE (NEAL). The Judgment of the District Court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. MEIRL GILBERT NEAL, and LYNDON CLAY HARLOW, Defendants.	)	CRIMINAL NO. 88-30020

INDICTMENT

COUNT 1

The Grand Jury charges:

That on or about March 9, 1988, through, on or about March 17, 1988, in the Central District of Illinois, and elsewhere,

MEIRL GILBERT NEAL, and
LYNDON CLAY HARLOW,

the defendants herein, did knowingly combine, conspire, confederate and agree with each other and with other persons know [sic] and unknown to the Grand Jury to commit certain acts in violation of the laws of the United States, to wit: a) to knowingly possess with intent to distribute Lysergic Acid Diethylamide (LSD), a Schedule I Controlled Substance, and b) to knowingly distribute Lysergic Acid Diethylamide (LSD), a Schedule I Controlled Substance, both in violation of Title 21, United States Code, Section 841(a)(1).

All in violation of Title 21, United States Code, Section 846.

COUNT 2

That on or about March 17, 1988, in the Central District of Illinois,

MEIRL GILBERT NEAL, and
LYNDON CLAY HARLOW,

the defendants herein, did knowingly and unlawfully possess with intent to distribute one gram or more of a mixture of a substance containing a detectable amount of Lysergic Acid Diethylamide (LSD), a Schedule I Controlled Substance.

All in violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL,

/s/ Danny H. Hattaway
FOREPERSON

/s/ J. William Roberts
J. WILLIAM ROBERTS
UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

(Caption Omitted In Printing)

CRIMINAL NO. 88-30020

SUPERSEDING INDICTMENT

COUNT 1

The Grand Jury charges:

That on or about March 9, 1988, through, on or about March 17, 1988, in the Central District of Illinois, and elsewhere,

MEIRL GILBERT NEAL, and
LYNDON CLAY HARLOW,

the defendants herein, did knowingly combine, conspire, confederate and agree with each other and with other persons know [sic] and unknown to the Grand Jury to commit certain acts in violation of the laws of the United States, to wit: a) to knowingly possess with intent to distribute 10 grams or more of a mixture or substance containing a detectable amount of Lysergic Acid Diethylamide (LSD), a Schedule I Controlled Substance, and b) to knowingly distribute 10 grams or more of a mixture or substance containing a detectable amount of Lysergic Acid Diethylamide (LSD), a Schedule I Controlled Substance, both in violation of Title 21, United States Code, Section 841(a)(1).

All in violation of Title 21, United States Code, Section 846.

COUNT 2

That on or about March 17, 1988, in the Central District of Illinois,

MEIRL GILBERT NEAL, and
LYNDON CLAY HARLOW,

the defendants herein, did knowingly and unlawfully possess with intent to distribute ten grams or more of a mixture of a substance containing a detectable amount of Lysergic Acid Diethylamide (LSD), a Schedule I Controlled Substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

A TRUE BILL,

_____

FOREPERSON

_____

J. WILLIAM ROBERTS
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT

CENTRAL District of **ILLINOIS**

UNITED STATES OF AMERICA

V.

MEIRL GILBERT NEAL

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 88-30020-01
(Filed Jun. 19, 1989)

(Name of Defendant)

Michael Costello
Defendant's Attorney

THE DEFENDANT:

[x] pleaded guilty to count(s) 1 and 2.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
T. 21, Sec. 846	Conspiracy to Distribute and Distribution of LSD (10 Grams or More)	1
T. 21, Sec. 841(a)(1)	Possession With Intent to Distribute LSD (10 Grams or More)	2

The defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[ ] The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

[X] It is ordered that the defendant shall pay to the United States a special assessment of $100.00, which shall be due immediately.

If is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
354-32-7547

Defendant's mailing address:
937 N. Indiana Street
Springfield, IL 62702

Defendant's residence address:
937 N. Indiana Street
Springfield, IL 62702

JUNE 19, 1989
Date of imposition of Sentence

/s/ Richard Mills
Signature of Judicial Officer

RICHARD MILLS,
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

JUNE 19, 1989
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 192 months on each Count, to run concurrently.

[ ] The Court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[X] The defendant shall surrender to the United States Marshal for this district,

~~a.m.~~
[X] at 1:30 p.m. on June 26, 1989.
[ ] as notified by the Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

[ ] before 2 p.m. on _____ .
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five years on each count, to run concurrently.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

1. That the defendant not commit any local, state or federal crime;

2. That the defendant abide by the Court's standard conditions of supervised release;

3. That the defendant not possess any firearm or ammunition or other dangerous weapon;

4. That the defendant shall participate in a substance abuse program, which may include urinalysis at the direction of, and at the discretion of the U.S. Probation Office.

PROBATION

The defendant is hereby placed on probation for a term of _____ .

While on probation, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this Judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) The defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the

probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $_____, consisting of a fine of $_____ and a special assessment of $_____.

[ ] These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

This sum shall be paid [ ] immediately.
[ ] as follows:

[ ] The Court has determined that the defendant does not have the ability to pay interest, it is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

IN THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF ILLINOIS

CASE NO. 88-30020-01

(Caption Omitted In Printing)

DEFENDANT NEAL'S PRO SE MOTION TO MODIFY SENTENCE PURSUANT TO 18 USC 3582 (c)(2) AND RETROACTIVE AMENDMENT PERTAINING TO WEIGHT OF LSD

Comes now the Defendant, Meirl Gilbert Neal, Pro Se, and moves this Court to modify his sentence pursuant to 18 USC 3582(c)(2). Defendant respectfully requests this Court to follow the Sentencing Commission's decision to retroactively apply the amendment pertaining to determining weight of LSD and to find that based thereon his total offense level would be 26 calling for a sentencing range of 92-115 months based on his Criminal History category of 3 and to resentence him to the low end of that range.

In support of this Motion, Neal would show the Court as follows:

1. That on June 19, 1989, Neal was sentenced to a term of imprisonment of 192 months and a three year term of supervised release pursuant to his plea of guilty to a charge of conspiracy to distribute and distribution of LSD (21 USC 846) and to a charge of possession with intend [sic] to distribute LSD (21 USC 841).

2. As set forth in paragraph 36 of his PSI a copy of which is attached hereto as Exhibit 1, Neal was assigned under U.S.S.G. 2D1.1 an initial base offense level of 36, based on 109.51 grams of LSD, which included both the

LSD doses and the carrier medium. Neal was given a 2 point reduction for acceptance of responsibility under U.S.S.G. 3E1.1, thus culminating in a total offense level of 34. See paragraphs 43 and 44 of PSI attached hereto as Exhibit 2.

3. Given Neal's Criminal History Category III and total base offense level of 34, the Guidelines provided for a sentencing range of 188 to 235 months, and this Court sentenced Neal to 192 months, representing the low end of the Guidelines.

4. That on November 1, 1993 U.S.S.G. 2D1.1, utilized in determining Neal's sentence, was amended by Sentencing Commission to provide in LSD cases the carrier medium should be excluded in determining weight by inserting in the Notes after the Drug quantity Table the following additional paragraph at the end, to wit:

> "In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg. of LSD for purposes of the Drug Quantity Table."

5. That the U.S. Sentencing Commission voted to give the above retroactive effect under 18 USC 3582 (c)(2) pursuant to U.S.S.G. 1B1.10(d) by adding the LSD Amendment to the list of amendments provided for in U.S.S.G. 1B1.10(d). Specifically 58 Fed. Reg. 52530 (10/8/93) amends Guideline IB1.10(d) by adding "484, 488, 490, 499." as additional Amendments to be applied retroactively. New Guideline 2D1.1(c) upon which this Motion is based in proposed amendment 14 found at 58

Fed. Reg. 27155 (5/6/93). According to the U.S. Sentencing Commission, proposed amendments 5, 12, 14, and 17 found at 58 Fed. Reg. 27150, 27155, and 27157 (5/6/93) are the amendments referred to by the additions to Guideline 1B1.10(d).

6. That this Court therefore has jurisdiction to hear and grant this Motion and afford Neal the relief he has requested in that 18 USC 3582(c)(2) provides in pertinent part as follows, to wit:

> "(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has been subsequently lowered by the Sentencing Commission . . . the Court may reduce the term of imprisonment . . . if such reduction is consistent with applicable policy statements issued by the Sentencing Commission."

As indicated in paragraph 5 the U.S. Sentencing Commission voted to make the amendment to 2D1.1 directing the weight of LSD to be determined by multiplying the number of doses by 0.4 mg retroactive and it has been appropriately listed in U.S.S.G. 1B1.10(d), the applicable policy statement.

7. That this Honorable Court has, as precedent, granted identical relief to Neal's co-defendant and Wife, Gail E. Walden, in Case No. 89-30042 and ordered her immediate release from prison based on a retroactive application of U.S.S.G. 2D1.1.

8. That Neal's PSI attributes 10,702 doses of LSD to him, to wit:

a. 2/5/88 transaction referred to in PSI paragraph 14 on page 8. (Ex 3) 50doses

b. 2/27/88 transaction referred to in PSI paragraph 16 on pages 8-9. (Ex 3,4) 100 doses

c. 3/1/88 transaction referred to in PSI paragraph 19 on page 9. (Ex 4) 50 doses

d. 3/9/88 transaction referred to in PSI paragraph 20 on page 9-10. (Ex 4,5) 2,000 doses

e. 3/10/88 transaction referred to in PSI paragraph 21 on page 10-11. (Ex 5,6) 2,502 doses

f. 3/17/88 transaction referred to in PSI paragraph 23 & 24 on page 11 (Ex 6) 6,000 doses

10,702 doses

and that based on 0.4 mg per dose Neal is accountable under his PSI for 4.28 grams under amended 2D1.1 which translates into a total base offense level of 28 under 2D1.1 (as opposed to the offense level found in paragraph 36 of Neal's PSI using the carrier medium) and with the 2 point reduction under 3E1.1 which Neal originally received (as provided for in paragraph 43 of his PSI) Neal's total offense level would be 26, calling for a sentencing range of 92-115 months based on his Criminal History Category III.

8. That the statutory penalty for an offense involving 4.28 grams of LSD is set forth in 21 USC 841 (b)(1)(B)(v) and it provides for a mandatory minimum sentence of 5 years.

9. That Neal commenced his sentence on June 26, 1989, and has served fifty-two months and is in his 53rd month.

10. Neal is presently incarcerated as a minimum security inmate with out custody at the Federal Prison Camp at Terre Haute, Indiana.

11. That Neal would respectfully advise the Court that the following factors support the reduction of his sentence as contemplated by the decision of the US Sentencing Commission to amend 2D1.1 in so far as the method of computing weight of LSD and making said amendment retroactive, to wit:

a. That upon his arrest, Neal cooperated fully with the government, the particulars of which are documented in paragraphs 25-30 of his PSI at pages 11-13. See Ex. 6, 7, 8

b. That this Court at page 2 of its Report of Statement of Reasons for Imposing Sentence, a copy of which is attached hereto as Ex 9, noted that Neal "has a stable employment history and *cooperated with law enforcement officials.*"

c. That Neal's prison behavior has been exemplary as corroborated by the fact he is presently held at a camp and has out custody.

d. Neal attaches hereto his June 29, 1993 Progress Report as Exhibit 10 which notes the following positive factors, to wit:

   i. Paragraph 17(a) notes Neal "has made an *excellent* adjustment to his incarceration."

   ii. Paragraph 17(b) notes a review of Neal's most recent work performance rating sheet "indicates he's an *outstanding* worker who *does superior* work and who is very quick to learn."

   iii. Paragraph 17(d) notes "Mr. Neal has developed an *outstanding* relationship with staff."

e. That based on the principle of stare decisis, this Courts decision in *USA v Walden* Case No. 89-30042 in this Court, supports the relief requested.

Wherefore, Defendant, Neal, Pro Se, respectfully requests this Court to grant this Motion and to find his total offense level is a 26 providing for a sentencing range of 92-115 months and to modify his sentence to the low end thereof.

Respectfully submitted,

/s/ Meirl G. Neal
Meirl G. Neal
07714-026
Unit A-1
PO Box 33
Terre Haute, Indiana 47808

CERTIFICATE OF SERVICE

I certify that on the 8th day of December, 1993, I mailed a copy of this Motion to the US Attorney addressed to 312 Federal Building, Springfield, Illinois 62701.

/s/ Meirl G. Neal
Meirl G. Neal

UNITED STATES DISTRICT COURT
Central District of Illinois

UNITED STATES OF AMERICA

v. Case Number CR 88-30020

MEIRL GILBERT NEAL
Defendant.

AMENDED
Judgment of 6/19/89 is Vacated.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Resentencing upon amendments to sentencing guidelines:

The defendant, MEIRL GILBERT NEAL, was represented by Michael Costello.

The defendant pleased guilty to count(s) 1 & 2. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 846	Conspiracy to Distribute and Distribution of LSD	3/17/88	1
21 USC 841(a)(1)	Possession with intent to Distribute LSD	3/17/88	2

As pronounced on 3/28/94, the defendant is sentenced as provided in pages 2 through 4 of this Judgment.

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 29th day of March, 1994.

/s/ Richard Mills
Richard Mills
United States District Judge

Defendant's SSAN: 354-32-7547
Defendant's Date of Birth: 11/11/40
Defendant's address: c/o U.S. Marshal; 600 E. Monroe; Springfield, IL 62701

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 120 months on each court [sic] to run concurrently.

The defendant is remanded to the custody of the United States Marshal.

The defendant is given credit for time served.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _ to _ at _, with a certified copy of this Judgment.

/s/ _____
United States Marshal

By /s/ _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain

unpaid at the commencement of the term of supervised release.

3. The defendant shall not own or possess a firearm, ammunition, or destructive device.

4. The defendant shall participate in a substance abuse program, which may include urinalysis at the direction of, and in the discretion of the U.S. Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer, to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

[✓] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except: (see attachment, if necessary)

OR

[ ] The court adopts the factual findings and guideline application from the Plea Agreement and information presented at the sentencing hearing. The court finds, pursuant to Federal Rule of Criminal Procedure 32(c)(1), that there is sufficient information in the record to waive the presentence report.

Guideline Range Determined by the Court:

Total Offense Level: 25

Criminal History Category: III

Imprisonment Range: 70 to 87 months; Mand. Min. 120 months

Supervised Release Range: 3 to 5 years; Statutory Term ___ Years

Fine Range: $10,000 to $8,000,000

[✓] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

[ ] Community service in lieu of fine.

Restitution: $1,460

[ ] Full restitution is not ordered for the following reason(s):

[✓] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reasons to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): punishment and deterrence.

OR

The sentence departs from the guideline range

[ ] Upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

Dated this 29th day of March, 1994

/s/ Richard Mills
RICHARD MILLS
United States District Judge

UNITED STATES OF AMERICA, Plaintiff,
v. MEIRL G. NEAL, Defendant.

UNITED STATES v. NEAL

No. 88-30020

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, SPRINGFIELD DIVISION

846 F. Supp. 1362

March 28, 1994, Decided
March 29, 1994, Filed

COUNSEL: For Plaintiff: Byron G. Cudmore, Asst. U.S. Attorney, Springfield, IL.

For Defendant: Michael Costello, Springfield, IL.

JUDGES: MILLS

OPINION BY: FOR THE COURT; RICHARD MILLS

OPINION:

RICHARD MILLS, District Judge:

This cause is before the Court for resentencing of the Defendant on the Defendant's motion for modification of his original sentence in light of the retroactive amendment of the sentencing guidelines. The Court will consider modification of the Defendant's original sentence only insofar as that sentence is affected by the amended guidelines.

On February 13, 1989, the Defendant pled guilty to the offenses of conspiracy to distribute LSD and possession with intent to distribute LSD, and the Defendant was subsequently sentenced to a term of imprisonment of 192 months. Since that time, the U.S. Sentencing Guidelines

have been retroactively amended to modify the calculation of the weight of LSD to be attributed to a defendant. The LSD possessed by the Defendant in this case was contained on absorbent blotter paper with a gross weight of 109.51 grams. U.S.S.G. @ 2D1.1(c) now prescribes a weight of .4 milligrams for each dose of LSD contained on a sheet of blotter paper.

The blotter paper possessed by the Defendant contained 11,456 dosages of LSD, which when multiplied by .4 milligrams results in a total weight of 4.58 grams of LSD. Consequently, the Defendant has a base offense level of 28 points, pursuant to U.S.S.G. @ 2D1.1(c)(8). Given the Defendant's criminal history category of III and a three-point offense level reduction for acceptance of responsibility, the appropriate sentencing range under the revised guidelines is 70 to 87 months' imprisonment.

However, 21 U.S.C. @ 841(b)(1)(A)(v) provides that a defendant shall receive a mandatory minimum sentence of 10 years' imprisonment for offenses involving "10 grams or more of a mixture or substance containing a detectable amount of . . . LSD." The U.S. Supreme Court has held that for purposes of this mandatory minimum statute, the term "mixture or substance" includes the "blotter paper customarily used to distribute LSD." Chapman v. United States, 500 U.S. 453, 111 S. Ct. 1919, 1925, 114 L. Ed. 2d 524 (1991). Because the total weight of the blotter paper possessed by the Defendant which contained the dosages of LSD was 109.51 grams, the Defendant qualifies for the mandatory minimum sentence of 21 U.S.C. @ 841(b)(1)(A)(v) of 120 months, or 10 years.

The Defendant argues that due to the fact that the sentencing guidelines have been retroactively amended to reflect dosages as the basis for the calculation of LSD weights, the Defendant should only be held accountable for 4.58 grams of LSD, thus eliminating the imposition of a mandatory minimum sentence of 10 years. However, the background commentary to @ 2D1.1(c) of the sentencing guidelines specifically states that "this [revised] approach [for determining LSD weights] does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence (see Chapman; @ 5G1.1(b))." (emphasis added).

U.S.S.G. @ 5G1.1(b) states that "where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." In other words, if a statuté prescribes a mandatory minimum sentence, that statute shall prevail over the sentencing range prescribed by the guidelines. Thus, the mandatory minimum sentence of 120 months mandated by 21 U.S.C. @ 841(b)(1)(A)(v) supersedes the Defendant's revised guideline range of 70 to 87 months.

Such a finding derives from a reading of the plain language of the last sentence of the commentary to U.S.S.G. @ 2D1.1(c) referring to the Chapman case and U.S.S.G. @ 5G1.1(b). The commentary specifically indicates that the U.S. Sentencing Commission does not intend the statute governing mandatory minimum sentences to be affected by the revised method of calculating LSD weights. For this Court to hold otherwise would result in the nullification of the Chapman decision as it

relates to statutorily imposed mandatory minimum sentences, the validity of which the Sentencing Commission expressly chose to recognize. Consequently, the Defendant properly qualifies for a mandatory minimum sentence of 120 months' imprisonment.

Ergo, the Defendant's sentence of imprisonment is accordingly reduced from 192 months to 120 months. All other aspects of the Defendant's original sentence remain unchanged.

ENTER: 28 March, 1994

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: February 2, 1995

BEFORE: **Honorable** Richard A. Posner, Chief Judge
Honorable Walter J. Cummings, Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorable Joel M. Flaum, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge
Honorable Ilana Diamond Rovner, Circuit Judge

No. 94-1773

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

MEIRL G. NEAL,
Defendant - Appellant

Appeal from the United States District Court for the Central District of Illinois, Springfield Division
No. 88 CR 30020, Richard Mills, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

(1061-110393)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-1773

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MEIRL GILBERT NEAL,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois
No. 88-CR-30020 – Richard Mills, *Judge*.

ARGUED SEPTEMBER 22, 1994 –
REARGUED EN BANC: NOVEMBER 22, 1994 –
DECIDED FEBRUARY 2, 1995

Before POSNER, *Chief Judge*, and CUMMINGS, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, and ROVNER, *Circuit Judges*.

FLAUM, *Circuit Judge*. Defendant Meirl Gilbert Neal was convicted of conspiracy to distribute and possession with intent to distribute LSD-laced blotter paper and received a statutory minimum sentence of ten years imprisonment. Neal contests his sentencing, arguing that the district court misapplied the Sentencing Guidelines

by including the actual weight of the LSD carrier medium in ascertaining whether Neal merited a mandatory minimum sentence. We hold that the district court properly calculated Neal's sentence and therefore affirm.

I.

Understanding Neal's objection to his sentence requires a brief history of Congress's and the Sentencing Commission's approach to drug-related sentencing. In 1986, Congress adopted a "market-oriented" approach to punishing drug trafficking, *see* Anti-Drug Abuse Act of 1986, Pub.L. 99-570, 100 Stat. 3207 (1986), aimed at punishing retail and wholesale dealers "according to the weight of the drugs in whatever form they were found – cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level." *Chapman v. United States*, 500 U.S. 453, 461 (1991). Acting under this principle, Congress set mandatory minimum sentences corresponding to the weight of a "mixture or substance containing a detectable amount" of various controlled substances, including LSD. *See id.* (citing 21 U.S.C. §§ 841(b)(1)(A)(i)-(viii) and (B)(i)-(viii)). The statutory provision at issue both here and in *Chapman*, 21 U.S.C. § 841(b)(1), provides for mandatory minimum sentences for distributing more than a certain amount of a "mixture or substance containing a detectable amount" of LSD. The Court, applying an "ordinary meaning" to the key terms "mixture" and "substance," concluded that the weight of the blotter paper containing LSD, and not the weight of the pure drug alone, determines eligibility for the mandatory minimum sentence. *See Chapman*, 500 U.S. at 461-63.

Until recently, the Sentencing Guidelines also used the entire weight of the "mixture or substance," including the weight of the carrier medium, to determine the applicable sentencing range for crimes involving LSD. *See* U.S.S.G. § 2D1.1 and commentary. Effective November 1, 1993, however, the United States Sentencing Commission amended § 2D1.1 by prescribing a uniform (and somewhat less stringent) formula for calculating LSD quantity. *See United States v. Boot*, 25 F.3d 52, 54 (1st Cir.1994). The new Guideline approach (Amendment 488) establishes a presumptive weight of 0.4 milligrams per dose of LSD, regardless of the carrier medium. U.S.S.G. § 2D1.1. The district courts have discretion to apply this new formula retroactively, *see* 18 U.S.C. § 3582(c)(2); U.S.S.G. § 1B1.10(a) & (d), so that in appropriate circumstances a defendant may be considered for a reduction in a previously imposed sentence. *United States v. Holmes*, 13 F.3d 1217, 1222 (8th Cir.1994).

Defendant Neal was charged with conspiracy to distribute LSD, in violation of 21 U.S.C. § 846, and possession with intent to distribute LSD, in violation of 21 U.S.C. § 841(a)(1). Neal pleaded guilty to both counts on February 13, 1989. At sentencing, the district court held Neal accountable for blotter paper containing 11,456 doses or "hits" of LSD. The actual weight (including the carrier medium) of the 11,456 doses that Neal had possessed and conspired to distribute was 109.51 grams. This weight gave Neal, who fell into the Criminal History III category because of prior drunk driving convictions, a base offense level of 36. The offense level was reduced by two points for Neal's acceptance of responsibility, resulting in a final offense level of 34 and a sentencing range of

188 to 235 months. Accordingly, the district court sentenced Neal to 192 months of imprisonment on each count (the sentences to run concurrently) and five years of supervised release.

On December 10, 1993, Neal filed a pro se motion to reduce his sentence because of the intervening amendment to the Sentencing Guidelines. The district court elected to apply the amendment retroactively and recalculated the weight of the 11,456 doses as 4.58 grams. The recalculation gave Neal a base offense level of 28. Subtracting three points for acceptance of responsibility (Neal was allowed an additional one-point reduction for a timely plea), the district court placed Neal at a final offense level of 25, which provides in the Criminal History III category a sentencing range of 70 to 87 months.

However, the district court held that it had to follow the *Chapman* definition of "mixture or substance" in calculating the weight of the LSD for determining the applicability of any minimum penalty under § 841(b)(1). The weight of the LSD blotter paper for which Neal was convicted, 109.51 grams, mandated a minimum sentence of ten years. 21 U.S.C. § 841(b)(1)(A)(v) (providing for a mandatory minimum ten year sentence for conviction involving more than 10 grams of LSD); U.S.S.G. § 5G1.1(b). The court therefore set Neal's sentence at 120 months. Neal objected, asserting that court should have used the 4.58 gram calculation, which would require a mandatory minimum of only five years for a conviction involving more than one gram of LSD, 21 U.S.C. § 841(b)(1)(B)(v), and allow the court to impose a sentence between 70 and 87 months. The court overruled Neal's objection and this appeal followed.

II.

The sole issue on appeal is whether the district court properly determined that an amendment to the Sentencing Guidelines prescribing a presumptive per dose weight of LSD applies to the calculation of a defendant's base offense level but not to his eligibility for a statutory mandatory minimum sentence.[1] An interpretation of the Guidelines and its amendments presents a question of law which we review *de novo*. *United States v. Jones*, 983 F.2d 1425, 1429 (7th Cir.1993). The particular question raised here is one of first impression in our circuit. *Cf. United States v. Tucker*, 20 F.3d 242, 244 (7th Cir.1994) (making reference to the presumptive weight for LSD under the Guidelines in the context of determining whether a defendant was subject to a mandatory minimum sentence for distribution of cocaine); *United States v. Sassi*, 33 F.3d 56 (7th Cir.1994) (table) (unpublished opinion, text at 1994 WL 450134, 1994 U.S.App. LEXIS 30412) (disposing of similar issues without published opinion).

Neal makes three basic arguments for using the per-dose weight calculation instead of the *Chapman* weight calculation in deciding whether to impose a mandatory

[1] Neal also challenges the enhancement of his criminal history because the court calculated it based on Neal's prior alcohol related driving offenses. Neal asserts that including such convictions, where the defendant was arguably an alcoholic and unable to control his drinking, violates due process and equal protection rights under the Fifth Amendment. The fact that we are upholding the mandatory minimum sentence renders the calculation of criminal history irrelevant and Neal's appeal on this point moot. We therefore express no opinion as to the merits of this argument.

minimum penalty for Neal's conduct under 21 U.S.C. § 841(b)(1). First, Neal submits that the presumptive weight approach reflected in U.S.S.G. § 2D1.1, as amended, applies to the determination of both a defendant's base offense level and his eligibility for the statutory mandatory minimum sentence. Neal argues that *Chapman* does not conflict with this interpretation because Congress, through its inaction, has accepted the Guidelines amendment as the authoritative definition of the phrase "mixture or substance" for purposes of both the Guidelines and the mandatory minimum sentencing scheme. Neal also maintains that to the extent *Chapman* requires inclusion of the weight of the carrier medium, the amended Guidelines' weight calculation does include, in part, the weight of the carrier and is thus merely an application of *Chapman*. Second, Neal suggests that the "dual weight" sentencing scheme used by the district court is so illogical and unjust that it violates the Due Process Clause. Third, Neal contends that the dual method of weight calculation under the amended Guidelines creates an ambiguity that requires us to invoke the rule of lenity and impose a lesser punishment. We address each argument in turn.

A.

Under the district court's interpretation of federal law, a single amount of LSD is assigned two different weights for sentencing purposes: one weight for determining the base offense level under the Guidelines and another weight for determining eligibility for the mandatory minimum sentence provided in 21 U.S.C. § 841(b)(1)(A)(v). The Guidelines, as the Supreme Court

has observed, "were meant to establish a range of determinate sentences for categories of offenses and defendants according to various specified factors," *Mistretta v. United States*, 488 U.S. 361, 368 (1989), in order to provide certainty and fairness and to eliminate unwarranted disparities in the sentences imposed upon similarly situated defendants. *See* 28 U.S.C. § 991(b)(1)(B). At the same time, however, the Commission itself has long recognized that Congress has been of two minds with respect to sentencing federal criminals:

> The sentencing guidelines system is essentially a system of finely calibrated sentences. For example, as the quantity of drugs increases, there is a proportional increase in the sentence. In marked contrast, the mandatory minimums are essentially a flat, tariff-like approach to sentencing. Whereas guidelines seek a smooth continuum, mandatory minimums result in "cliffs." The "cliffs" that result from mandatory minimums compromise proportionality, a fundamental premise for just punishment, and a primary goal of the Sentencing Reform Act.

United States Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (summary) (August 1991); *see also United States v. McFadden*, 13 F.3d 463, 467-68 (1st Cir.1994) (Breyer, C.J., dissenting) (noting that mandatory minimum statutes represent an "ad hoc derivation" from the more general policy reflected in the Sentencing Guidelines). Though they seem to make an odd pair, it must be noted that the Guidelines and statutory mandatory minimum scheme were enacted by Congress almost simultaneously and continue to coexist, and sometimes

overlap. Indeed, the Guidelines specifically contemplate conflict between the two schemes, and direct that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." U.S.S.G. § 5G1.1.

The post-amendment Commentary[2] to § 2D1.1 clearly indicates that the Commission promulgated Amendment 488 in full recognition that it would create a "dual weight" system of calculating the weight of LSD for sentencing purposes and that where the Guidelines approach conflicted with the statutory mandatory minimum scheme, the latter would prevail. The first paragraph of that Commentary notes that "in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligrams *for purposes of determining the base offense level.*" U.S.S.G. § 2D1.1 Commentary (emphasis supplied). The Commentary concludes by stating that "this approach *does not override* the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence," citing both *Chapman* and U.S.S.G. § 5G1.1(b). *Id.* Even if an amendment to the Sentencing Guidelines could supercede the Supreme Court's interpretation of a separate statute, these two sentences make clear that the amendment to

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[2] Commentary in the Guidelines, at least if it is interpreting a specific guideline, is to be given the same force and effect as the Guidelines language itself unless the Commentary "violates the Constitution or a federal statute, or it is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 113 S.Ct. 1913, 1920 (1993); *United States v. Lamb*, 6 F.3d 415, 420 (7th Cir.1993).

§ 2D1.1 purported to do no such thing. In any event, this is not a case like McFadden, in which we might "read language in different, but related, statutes, so as best to reconcile those statutes, in light of their purposes and of common sense." 13 F.3d at 467 (Breyer, C.J., dissenting) (arguing that the majority's interpretation of the word "use" in a statute (18 U.S.C. § 924(c)) prescribing a mandatory minimum sentence to encompass "possession" unnecessarily swallows up a guideline (U.S.S.G. § 2D1.1(b)(1)) that distinguishes among different kinds of drug- and gun-related criminal behavior). Here, the Supreme Court has authoritatively construed the term "mixture or substance" in 21 U.S.C. § 841(b)(1)[3] to mean that "[s]o long as it contains a detectable amount, the entire mixture or substance is to be weighed when calculating the sentence." *Chapman*, 500 U.S. at 459; *see also Boot*, 25 F.3d at 55 ("Until the Supreme Court or the Congress revisits the issue, *Chapman* governs the meaning of the term 'mixture or substance' in 21 U.S.C. § 841(b)(1)(B)(v), as the Commission itself acknowledged when it promulgated Amendment 488."). The Commission is without authority to override *Chapman*.[4] As Judge

[3] In *Chapman*, the Supreme Court expressly interpreted only § 841(b)(1)(B)(v) and not § 841(b)(1)(A)(v). The two provisions, however, are nearly identical and only differ in what number of grams of LSD will result in what minimum sentence. No reason exists to interpret them differently, and Neal has not suggested that we do this.

[4] Neal suggests that the per dose calculation, in assigning a presumptive weight of 0.4 milligrams per dose of LSD (a presumptive weight of 0.05 milligrams to the pure LSD dosage and 0.35 milligrams to the carrier), does "assign some weight to the carrier medium" and is therefore an appropriate interpretation of *Chapman*. Such a reading conflicts with the language of *Chapman* ("So long as it contains a detectable amount, the entire mixture or substance is to be weighed when calculating the sentence.") and is an untenable reinterpretation that the Commission neither adopted nor could have adopted.

Easterbrook has noted, "[t]he Sentencing Reform Act creates only the power to guide judicial discretion within the statutory limits," *United States v. Seacott*, 15 F.3d 1380, 1392 (7th Cir.1994) (Easterbrook, J., concurring); it does not "vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime." *Mistretta*, 488 U.S. at 396. Congress has authorized the Commission to permit sentences lower than mandatory minima, 18 U.S.C. § 3553(c), but only within the parameters laid out by that statutory provision. *See id.* (authorizing departures for substantial assistance to the government and for mitigating circumstances not adequately taken into consideration in the formulation of the Guidelines); *see also* U.S.S.G. § 5K2.0. The Commission understood all of these limitations on its power, and the district court applied the relevant statute and guideline as both Congress and the Commission intended.

B.

Neal next contends that using a presumptive weight to calculate the base offense level and the actual weight to determine eligibility for the mandatory minimum sentence creates an illogical and arbitrary distinction between defendants that violates the Due Process Clause of the Fifth Amendment. A statute runs afoul of the Due

Process Clause only if it "manifests a patently arbitrary classification, utterly lacking in rational justification." *Weinberger v. Salfi*, 422 U.S. 749, 768 (1975); *see also United States v. Lawrence*, 951 F.2d 751, 754 (7th Cir.1991). Moreover, the statute's justification need not be expressly articulated or readily apparent "so long as a court can divine some rational purpose." *United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C. Cir.1989) (citation omitted).

In *Chapman*, the Supreme Court expressly found that Congress had a rational basis for the market-oriented sentencing scheme reflected in 21 U.S.C. § 841(b)(1)(B)(v):

> By measuring the quantity of drugs according to the "street weight" of the drugs in the diluted form in which they are sold, rather than according to the net weight of the active component, the statute and the Sentencing Guidelines increase the penalty for persons who possess large quantities of drugs, regardless of their purity. That is a rational sentencing scheme.

500 U.S. at 465. Subsequently, the Commission decided to establish a presumptive weight per dose of LSD for purposes of determining the defendant's base level "[b]ecause the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself." U.S.S.G. § 2D1.1 Commentary. As a result of this "dual weight" scheme, a defendant who is accountable for no more than approximately 104 doses on blotter paper like Neal's may receive a sentence ranging from probation to a few months imprisonment, *see* U.S.S.G. § 5C1.1, comment (n.3), while a defendant who

exceeds that threshold will qualify for a mandatory minimum five-year sentence.[5] In such circumstances, the statutory mandatory minimum creates a very steep "cliff" for the unlucky drug dealer who is caught distributing a few more doses than a more fortunate cohort. While this may be an ill-advised policy that metes out a severe punishment, it does have a rational basis – those who deal more LSD will be punished more heavily than those who deal less, and at a certain point there is a qualitative leap in the seriousness of the deed that will give rise to a sudden rather than an incremental increase. Such judgments are for Congress, not the courts, and we will not interfere with them.

C.

Neal also asks us to invoke the rule of lenity in view of an alleged ambiguity engendered by using two different methods to determine the weight of LSD for sentencing purposes. "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). However, the rule of lenity is inapplicable unless there is a "grievous ambiguity or uncertainty in the language and structure of the Act," *Huddleston v. United States*, 415 U.S.

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[5] For the defendant in *Chapman*, the number of doses triggering the mandatory minimum five-year imprisonment would have been about 175. *See Chapman*, 500 U.S. at 455-56. A defendant responsible for between 125 doses and 250 doses of LSD is eligible for imprisonment of only one-half the specified guideline range, followed by supervised release with a condition of community confinement or home detention. U.S.S.G. § 5C1.1, comment. (n.4).

814, 831 (1974), such that even after a court has "seize[d] everything from which aid can be derived," it is "left with an ambiguous statute." *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805)); *see also United States v. Shabani*, 115 S.Ct. 382, 386 (1994) ("The rule of lenity, however, applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute.").

Such ambiguity does not exist here. The statute and sentencing guidelines clearly instruct the court to impose a minimum ten year sentence if the weight of any LSD and its carrier medium exceed 10 grams. Neal has presented nothing to this court to undermine that conclusion, and that conclusion does not produce consequences "so absurd or glaringly unjust" as to make us reconsider whether the result comports with Congress's intent. *United States v. Rodgers*, 466 U.S. 475, 484 (1984). As such, the rule of lenity does not apply.

D.

Finally, we note that every other court to have considered this issue has arrived at the same conclusion we have. *See United States v. Pardue*, 36 F.3d 429 (5th Cir.1994); *Cox v. United States*, 35 F.3d 565 (6th Cir.1994) (table) (unpublished opinion, text at 1994 WL 443250, 1994 U.S.App. LEXIS 22188); *United States v. Dimeo*, 28 F.3d 240 (1st Cir.1994); *United States v. Mueller*, 27 F.3d 494 (10th Cir.1994); *United States v. Boot*, 25 F.3d 52 (1st Cir.1994); *United States v. Richardson*, 1994 WL 601924 (S.D.Ala. November 1, 1994); *United States v. Bugella*, 861

F.Supp. 77 (M.D.Fla.1994); *United States v. Pirnat*, 859 F.Supp. 995 (E.D.Va.1994); *United States v. Kinder*, 853 F.Supp. 122 (D.Ver.1994); *see also United States v. Smith*, 39 F.3d 1143, 1146 n.2 (11th Cir.1994) (noting but declining to address issue); *United States v. Stauffer*, 38 F.3d 1103, 1108 n.2 (9th Cir.1994) (same). A panel of the Eighth Circuit did issue an opinion contrary to this line of cases, *United States v. Stoneking*, 34 F.3d 651 (8th Cir.1994), but that opinion was vacated pending rehearing *en banc*. 1994 WL 601482 (8th Cir. September 16, 1994). We see no occasion here to depart from the reasoned opinions of these courts and thereby create a circuit split.

III.

Congress has declined to follow a single approach to federal sentencing policy. In most cases, a defendant's sentence will be determined under the generally applicable Guidelines scheme which increases a defendant's sentence in rough proportion to the severity of the crime. For a few select classes of criminals (most notably, repeat offenders and large-scale drug dealers), however, Congress has enacted more stringent mandatory minimum sentences that abruptly depart from the Guidelines regime. By enhancing the punishment for distributing larger amounts of drugs (and by including the carrier medium in the computation of the quantity of drugs attributed to the defendant), Congress acted within its province. The Guidelines amendment creating a presumptive weight for purposes of calculating a defendant's base offense level, in effect, cuts small scale dealers a break by making them eligible for shorter sentences, and even probation. However, as the Commentary made clear, the amendment did

not (and, in our view, could not) trump the statutory mandatory minimum provisions. Under *Stinson v. United States*, 113 S.Ct. 1913, 1919 (1993), the Commission may reconcile conflicting judicial interpretations of the Guidelines by clarifying the Guidelines, as it did through Amendment 488. However, nothing in *Stinson* suggests that a Guidelines amendment can resolve a conflict between the Guidelines and a statute with respect to the meaning of a statutory term. The Supreme Court has authoritatively construed the term at issue in this case, and, in the absence of either Congressional amendment or clarification of the statute or a reinterpretation of the relevant language by our judicial superiors, we, like the Commission, are bound by *Chapman* for the purpose of applying the mandatory minimum scheme. The district court properly applied the Sentencing Guidelines.

AFFIRMED.

RIPPLE, *Circuit Judge*, with whom CUMMINGS and ROVNER, *Circuit Judges*, join, dissenting. This case presents a straightforward task that ought to be easily accomplished – the sentencing of a person who has been convicted of distributing LSD. Several provisions of law must be considered. However, the harmonization of those provisions is quite a bit less complicated than the circuitous approach taken by the majority. The judiciary has an obligation to presume that those who sit in the Congress intend that the country be governed by a sentencing system that, although composed of both mandatory minimum sentences and the guideline ranges, operates as an integrated and fair system of criminal justice.

The sections that follow first set forth the approach to sentencing LSD offenders now sanctioned by the Congress and explain why that approach is supported by well-established principles. Finally, the legal and practical infirmities inherent in the approach now adopted by the majority are addressed.

A.

In determining the appropriate sentencing methodology, we must begin with the statute. Section 841(a) of Title 21 proscribes the distribution of certain substances, including LSD. Section 841(b)(1)(B)(v) establishes a mandatory minimum sentence for a conviction of distribution of certain amounts of a "mixture or substance" containing "a detectable amount" of LSD.

Pursuant to its statutory authority to set sentencing ranges for the distribution of contraband substances, including LSD, the United States Sentencing Commission has set a range of terms of imprisonment for violations of the statute. These terms of imprisonment are correlated to the weight of the controlled substance. Therefore, U.S.S.G. § 2D1.1(c), the Drug Quantity Table of the Guidelines, establishes sentencing ranges for narcotics violations of § 841; the length of a sentence increases proportionally with the increased quantity of the drug in question. In the case of LSD in a carrier medium, the Sentencing Commission, through a recent revision ("Amendment 488"), has set the range of sentences so that each dose of LSD has a presumptive weight of 0.4 mg. In the "Background" Commentary to § 2D1.1 that accompanies this recent revision, the Commissioners

noted that the weights of carrier media differ widely. In order to avoid the injustice of disparate sentences caused solely by the varying weight of different carrier media used by different defendants, the Commission selected a fixed weight to ensure against unwarranted disparity in sentences. The Commission also noted that assigning a fixed weight to the medium was necessary to ensure that those convicted of distributing LSD were not treated unfairly in comparison to defendants convicted of distributing other contraband substances even more dangerous than LSD.

In selecting 0.4 mg, the Commissioners noted that this weight exceeded the standard dosage unit of 0.05 mg for pure LSD as calculated by the Drug Enforcement Administration. It justified that higher weight on the ground that justice required that the carrier medium be calculated evenhandedly into the sentencing determination. The Commission gave two reasons for this inclusion of the carrier medium: (1) The weight of most controlled substances in the Drug Quantity Table includes the amount of a carrier medium; (2) In *Chapman v. United States*, 500 U.S. 453 (1991), the Supreme Court interpreted the statutory section imposing a mandatory minimum sentence for the distribution of a single gram or more of a mixture or substance containing LSD to require the inclusion of the carrier medium within the weight calculation. Therefore, in promulgating this method of calculating the weight of LSD in Amendment 488 after the Supreme Court's decision in *Chapman*, the Commission expressly addressed the need to comply with the Supreme Court's interpretation of the statute in *Chapman*. Congress, having

been explicitly advised of this change and of the Commission's interpretation of the Supreme Court's reading of the statute, took no action to countermand the Commission's promulgation. Therefore, the Sentencing Guideline's § 2D1.1(c), as revised by Amendment 488, is consistent with 21 U.S.C. § 841(b). It fully takes into account the Supreme Court's interpretation of § 841(b) in *Chapman* with respect to the mandatory minimum sentence provision. Accordingly, it should govern the weight calculations of controlled substances for sentencing determinations.[1]

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[1] The following Circuits have addressed the issue in holding or dictum:
First Circuit: *United States v. Dimeo*, 28 F.3d 240, 241 (1st Cir.1994) (noting that a reduction in the mandatory minimum sentence would be inconsistent with the Commission's statement that Amendment 488 did not override "the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence"); *United States v. Boot*, 25 F.3d 52, 55 (1st Cir.1994) (stating that "Congress simply acquiesced in the restrictive reach of Amendment 488 duly noted by the Commission").
Fifth Circuit: *United States v. Pardue*, 36 F.3d 429, 431 (5th Cir.1994) (per curiam) (focusing on the "does not override" language in the Background Commentary to § 2D1.1(c) and finding that this language "leads to the inescapable conclusion that the mandatory minimum of § 841, calculated according to *Chapman*, overrides the retroactive application of the new guideline").
Sixth Circuit: *Cox v. United States*, No. 94-3041, 1994 WL 443250, at **2, 1994 U.S.App. LEXIS 22188, at *4 (6th Cir. Aug. 16, 1994) (unpub. order) (finding that district court's refusal to order sentence below mandatory minimum "finds support in the plain language" of guideline § 5G1.1(b) and the Background Commentary to § 2D1.1).
Seventh Circuit: *United States v. Sassi*, No. 94-1363, 1994 WL 450134, 1994 U.S.App. LEXIS 22932 (7th Cir. Aug. 22, 1994) (unpub. order) (citing *Boot* and "does not override" language of the Background

B.

In stark contrast to the Commission's attempt, with the approval of the Congress, to maintain fairness in sentencing, the majority adopts an alternate approach, the so-called "dual weight" system of calculating LSD weight. Under that approach, a sentencing court first must use the actual weight of the controlled substance combined with its medium to determine whether the offender requires the mandatory minimum sentence. If

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Commentary and noting that Commission had not overridden *Chapman*), *petition for cert. filed*, (Nov. 21, 1994) (No. 94-7094).

Eighth Circuit: *United States v. Stoneking*, 34 F.3d 651 (8th Cir.1994) (rejecting dual weight analysis in favor of uniform application of presumptive weight), *vacated*, 1994 WL 601482, 1994 U.S.App. LEXIS 30466 (8th Cir. Sept. 16, 1994) (ordering rehearing en banc and scheduling argument for December 6, 1994).

Tenth Circuit: *United States v. Mueller*, 27 F.3d 494, 496-97 (10th Cir.1994) (concluding, in a case in which the defendant had received a reduction below the applicable mandatory minimum sentence pursuant to Fed.R.Crim.P. 35, that the defendant was not entitled to any further reductions because he was subject to a mandatory minimum at the time he was sentenced, but failing to analyze whether Amendment 488 could be read in harmony with the Supreme Court's decision in *Chapman*).

Two Circuits have reserved ruling on the question:

Ninth Circuit: *United States v. Stauffer*, 38 F.3d 1103, 1108 n.2 (9th Cir.1994) ("We express no view as to the effect of the Amendment [488] on the calculation of the mandatory minimums in light of the Supreme Court's decision in *Chapman v. United States*[.]").

Eleventh Circuit: *United States v. Smith*, 39 F.3d 1143, 1146 n.2 (11th Cir.1994) ("We express no opinion as to whether the drug quantity determination at sentencing is to be governed by the recent amendment to the sentencing guidelines . . . or by the rule set down by the Supreme Court in *Chapman*.").

the offender does not fall off the "cliff" and incur the mandatory minimum sentence, the court must then recalculate the sentence on the basis of the presumptive weight.

The majority suggests that this approach is consistent with the revised Guidelines. To support this assertion, it depends, without any heed to context, on an interpretation of two sentences of the revised guideline commentary. It first notes, adding its own emphasis, that the Commission wrote that the presumptive weight was established *"for purposes of determining the base offense level."* Opinion at 7 (emphasis supplied). It then quotes, again adding its own emphasis: " '[T]his approach *does not override* the applicability of "mixture or substance" for the purpose of applying any mandatory minimum sentence.' " *Id.* (emphasis supplied). Reading these two sentences in isolation and with the assistance of its own emphasis, the majority concludes that the Sentencing Commission intended, and the Congress agreed, that the determination of whether the mandatory minimum sentence was required would be made without reference to the weight established by the revised guideline.[2] However, these isolated selections make a great deal more sense when they are read in the context of the entire explanation given in the paragraphs above those

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[2] The opinion of the First Circuit in *Boot* focuses on the second of these sentences and claims that it alone is relevant: "Without more – and there is no more[.]" *Boot*, 25 F.3d at 55. But, as the following footnote demonstrates, there is a great deal more.

sentences.[3] Read in context, these sentences summarize the goals accomplished by the Commission in the

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[3] Amendment 488 provided, in pertinent part, that:

The Commentary to § 2D1.1 captioned "Application Notes" is amended by inserting the following additional note:

"18. LSD on a blotter paper carrier medium typically is marked so that the number of doses ('hits') per sheet readily can be determined. When this is not the case, it is to be presumed that each 1/4 inch by 1/4 inch section of the blotter paper is equal to one dose.

In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.".

The Commentary to § 2D1.1 captioned "Background" is amended by inserting the following paragraphs at the end:

"Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

amendment: (1) It harmonized offense levels for different controlled substances; (2) It lessened the "undue

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The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (*i.e.*, the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in *Chapman v. United States*, 111 S.Ct. 1919 (1991) (holding that the term 'mixture or substance' in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence (*see Chapman*; § 5G1.1(b)).".

influence" that different carrier weights would have on the offense level; and (3) It took into account *Chapman*'s

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The Commission has found that the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself (*e.g.*, LSD is typically placed on blotter paper which generally weighs from 5 to 10 milligrams per dose; the weight of the LSD itself per dose is generally from 0.02 to 0.08 milligram; the Drug Enforcement Administration describes a standard dose of LSD as containing 0.05 milligram of LSD). As a result, basing the offense level on the entire weight of the LSD and carrier medium produces unwarranted disparity among offenses involving the same quantity of actual LSD but different carrier weights, as well as sentences that are disproportionate to those for other, more dangerous controlled substances, such as PCP, heroin, and cocaine. Under the guidelines prior to the amendment, for example, 100 grams of heroin or 500 grams of cocaine (weights that correspond to several thousand doses, the number depending upon the purity) result in the same offense level as 125 doses of LSD on blotter paper (which has an average weight of 8 milligrams per dose) or 1 dose of LSD on a sugar cube (2000 milligrams per dose).

Consequently, in cases involving LSD contained in a carrier medium, this amendment establishes a weight per dose of 0.4 milligram to be used for purposes of determining the base offense level. The dosage weight of LSD selected by the Commission exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (*i.e.*, the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in *Chapman v. United States*, 111 S.Ct. 1919 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate

interpretation of the terms "mixture or substance" when applying a mandatory minimum sentence.

Any lingering doubt as to the appropriate reading of the guideline commentary ought to be dispelled by an examination of the practical effect of the majority's interpretation. Under the "dual weight" method of calculation, an LSD trafficker would receive the mandatory minimum sentence of five years for one gram or more of LSD by selling LSD in approximately one-half of a sugar cube or 125 blotter paper squares. *See* U.S.S.G. amend. 488 (noting that average weights of sugar cube and blotter square are 2000 mg and 8 mg, respectively); *cf. Chapman*, 500 U.S. at 458 n.2 (reproducing chart in which weights of various carrier media are listed; using these

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the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP (for example, 2000 doses of LSD at 0.5 milligram per dose equals 1 gram of LSD – corresponding to the lower limit of offense level 26; similarly, 2000 doses of PCP at 5 milligrams per dose, the standard amount of actual PCP in a dose, equals 10 grams of actual PCP – corresponding to the lower limit of offense level 26). Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the definition of mixture or substance for purposes of applying any mandatory minimum sentence (*see Chapman*; § 5G1.1(b)). The effective date of this amendment is November 1, 1993.

weights, a dealer could qualify for the five-year mandatory minimum by selling LSD in approximately one-half of a sugar cube, 72 blotter paper squares, or 445 gelatin capsules). By contrast, under the Sentencing Commission's method, whether an LSD trafficker receives the five-year mandatory minimum sentence will not depend on the type of medium he happens to use but on the number of doses he sells.

We ought not attribute to the Commission or to the Congress the injustice produced by the majority's interpretation. Until today, we have acknowledged that, although Congress has chosen to address sentencing policy issues through both statutes and sentencing guidelines, courts ought not presume lightly that it intended these two vehicles of the legislative will to work at odds with each other. Indeed, with respect to mandatory minimum sentences, we have explicitly noted that Congress did not intend to employ through the mandatory minimum sentence a scheme "so completely at odds with the measured approach required by the Guidelines." *United States v. Young*, 997 F.2d 1204, 1210 (7th Cir.1993); *see also United States v. Martinez*, 987 F.2d 920, 926 (2d Cir.1993) (same); *cf. United States v. Edwards*, 945 F.2d 1387, 1396 (7th Cir.1991) (explaining that "the limiting principle [of conspiracy liability] underlying conspiracy law and the Guidelines is essentially one and the same"), *cert. denied*, 112 S.Ct. 1590 (1992). Here, the Sentencing Commission established a methodology for attributing a weight to the dose of LSD that took into account, as the statute setting the mandatory minimum requires, the weight of the carrier medium. It therefore harmonized its setting of graduated, weight-based sentences with the command of the

mandatory statute. Congress has had the opportunity to scrutinize and approve the Commission's work.[4] After the amended § 2D1.1 was sent to Congress for review, it took effect without modification or delay, and hence with congressional approval, in November 1993. We ought not presume that the Congress was derelict in its duty to scrutinize the workproduct of the Commission. We certainly ought not assume that Congress has made conflicting policy decisions, especially when those decisions can be so easily reconciled.

Nor is it appropriate to lay the blame for the result reached today on the doorstep of the Supreme Court. *Chapman* does not require the result reached by the majority. In *Chapman*, the Supreme Court was asked to decide whether eligibility for the mandatory minimum sentence under 21 U.S.C. § 841(b) was to be determined by the weight of the pure LSD or of the carrier medium containing the LSD. It held that the mandatory minimum statute "requires the weight of the carrier medium to be included when determining the appropriate sentence for trafficking in LSD." 500 U.S. at 468. The Supreme Court was presented with only two choices in *Chapman*: to count either the infinitesimal weight of the pure LSD contained in a dose or the entire weight of the dose and the blotter paper. Faced with that choice, and in keeping with the market-oriented approach adopted by the Guidelines, the Court could only choose the weight of the pure drug and its carrier. Two years later, the Sentencing Commission, acknowledging *Chapman*, amended § 2D1.1. It assigned a standard dosage weight of 0.05 mg to a unit of pure LSD

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[4] *See* 28 U.S.C. § 994(p).

and a weight of 0.35 mg to the carrier medium in order to "harmonize offense levels" for different controlled substances and to balance the influence that different carrier weights would have on the applicable offense level for an LSD offense. This approach, explained the Commission, is faithful to the holding of *Chapman*. U.S.S.G. § 2D1.1, comment. (backg'd.). Amendment 488 simply assigns a rational and uniform weight to that portion of the carrier that can be said to be bonded or mixed with the drug. The amendment therefore satisfies *Chapman*'s interpretation of the mandatory minimum statute that the weight assigned to the LSD include the weight of the carrier medium. It retains the "market-oriented" approach, under which the total quantity of drugs distributed, rather than the amount of pure drug sold, is used to determine the length of the sentence. By assigning a weight per dose that is eight times the actual weight of the pure drug, the Sentencing Commission has determined, in effect, that 0.05 mg of LSD can be absorbed in a carrier eight times its weight. Thus, Amendment 488 remains true to the *Chapman* mandate that the weight of the carrier must be included if the carrier can be said to be bonded with or mixed with the drug. At the same time, it promotes the sentencing uniformity that has been at the heart of the Congress' effort to achieve sentencing reform. Years of incarceration and thousands of public dollars to support that incarceration ought not depend on whether the drug trafficker used blotter paper or sugar cubes as a medium.

The amendment was a refinement of the earlier practice of weighing on an ad hoc basis whatever carrier the defendant happened to use. Such a refinement of the

sentencing scheme through the action of the Commission, with the knowledge and the consent of the Congress, is an expected and necessary part of the process contemplated by the present sentencing scheme. As the Supreme Court recently noted:

> Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest.

Stinson v. United States, 113 S.Ct. 1913, 1919 (1993) (quoting *Braxton v. United States*, 500 U.S. 344, 348 (1991)). The Sentencing Commission has interpreted properly the Supreme Court's requirement that the carrier weight be included. By stating that its "approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence," the Commission has recognized the continued viability of the mandatory minimum sentence whenever the weight of the LSD is calculated by the method stated in § 2D1.1. Congress did not challenge that revision. It is now this court's responsibility to read the statutory sentencing provisions and the Guidelines as a consistent whole that expresses the intent of the Congress. *See United States v. Young*, 34 F.3d 500, 506 (7th Cir.1994). The sentence ought to be vacated and the case remanded for resentencing.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

_____

SUPREME COURT OF THE UNITED STATES

No. 94-9088

Meirl Gilbert Neal,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 19, 1995

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(5)

Supreme Court, U.S.
FILED
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CLERK

No. 94-9088

In The

Supreme Court of the United States

October Term, 1995

MEIRL G. NEAL,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED*

Does the dose-based weight calculation adopted by the Sentencing Commission for use in LSD cases apply to all aspects of sentencing in such cases, including calculation of the weight of LSD for purposes of determining eligibility for a mandatory minimum sentence?

(A) Does the Sentencing Reform Act empower the Commission, under the oversight of Congress, to define the technical phrase "mixture or substance containing LSD" in a penalty statute so as to bind sentencing courts implementing that statute?

(B) Should sentencing courts and this Court take into account the Sentencing Commission's 1993 definition of "mixture or substance containing LSD" notwithstanding this Court's 1991 decision in *Chapman v. United States*, 500 U.S. 453, which construed the phrase without benefit of the Commission's expert guidance?

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* The parties to this case in the Seventh Circuit were as captioned. In proceedings prior to Neal's initial sentence, Lyndon Harlow was a codefendant with Neal.

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Opinions Below

The opinion of the District Court appears as *United States v. Neal*, 846 F.Supp. 1362 (C.D. Ill. 1994). The opinion of the Court of Appeals appears as *United States v. Neal*, 46 F.3d 1405 (7th Cir. *en banc* 1995).

Jurisdiction

The opinion of the Court of Appeals was filed on February 2, 1995. On May 2, 1995, Neal timely filed a petition for a writ of *certiorari* [*see*, Rule 13.1 of this Court]. His petition was granted on June 19, 1995. This Court has jurisdiction under 28 USC § 1254(1).

Constitutional and Statutory Provisions

21 USC § 841(b)(1) is annexed as appendix "A".

21 USC § 3553(a) is annexed as appendix "B".

28 USC §§ 991 *et seq.*, are annexed as appendix "C".

United States Sentencing Guidelines § 2D1.1(c) fn '*' and relevant Commentary as amended 11/1/1993 are annexed as appendix "D".

Statement of the Case

A superseding indictment filed in the Central District of Illinois charged Neal with conspiracy to distribute LSD in violation of 21 USC § 846 and possession of LSD with intent to distribute it in violation of 21 USC § 841(a). The charges resulted from a series of controlled purchases of LSD mounted on blotter paper from Neal by Illinois State Police and a confidential informant. (May, 1989 PSR at

¶¶ 13-24) Neal pleaded guilty to both counts on February 13, 1989 (R.[1] 17).

21 USC § 841(b) sets penalties for LSD trafficking based on specified weights of "a mixture or substance containing a detectable amount of LSD"; the United States Sentencing Guidelines (USSG) similarly calibrate base offense levels in LSD cases to the quantity of the "mixture or substance containing" the drug. The statute further specifies that trafficking in 10 grams or more of such an LSD "mixture" triggers a *mandatory* minimum penalty of ten years imprisonment. 21 USC § 841(b)(1)(A)(v). Each count of the superseding indictment against Neal alleged that the offense involved more than ten grams of a mixture or substance containing LSD, thus implicating the ten year mandatory sentencing provision. (R. 6).

In sentencing Neal in 1989, the District Court interpreted the phrase "mixture or substance containing . . . LSD" to refer to the entire agglomeration of LSD and blotter paper; the court determined that Neal's 11,456 doses of blotter-mounted LSD weighed 109.51 grams, correlating to level 36 on the guidelines sentencing table. After adjusting downward for Neal's acceptance of responsibility[2] and factoring in his Category III criminal history, the court imposed a level 34 guidelines sentence in the lower range of 192 months, followed by a five year term of supervised release. (R. 19-20:1-3 [6/19/1989])

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[1] "R" refers to docket entries as listed in the records of the district court and the Seventh Circuit.

[2] Neal cooperated with law enforcement authorities, (May, 1989 PSR ¶¶ 25-29, 35), and admitted guilt without a trial.

In *Chapman v. United States*, 500 U.S. 453, 461 (1991), decided after Neal was sentenced,[3] this Court held that "blotter paper customarily used to distribute LSD is a 'mixture or substance containing . . . LSD' " within the meaning of 21 USC § 841(b), and therefore "it is the weight of the blotter paper containing LSD, and not the pure LSD, which determines eligibility for the minimum sentence." *Id.* at 455.

Two years after *Chapman* was decided and in response to its holding, the Sentencing Commission amended USSG § 2D1.1(c) fn. '*' so as to change the method by which drug quantity is calculated in LSD cases. In lieu of the gross weight of LSD and blotter paper carrier, amendment 488 substituted a presumptive weight of 0.4 mg. per *dose* of LSD; this weight multiplied by the number of doses yields the weight of the "mixture or substance containing a detectable amount of LSD." The reason for the amendment was that "basing the offense level on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences that are disproportionate to those for other, more dangerous controlled substances, such as PCP." (USSG *Manual*, App. C, Amend. 488 *eff.* 11/1/1993 as USSG § 2D1.1(c)'*'; App. n. 18 and Commentary: Background ¶ 7).

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[3] Although *Chapman* had not yet been decided, the District Court which sentenced Neal had already anticipated its holding in *United States v. Marshall*, 706 F.Supp. 650 (C.D. Ill., 1989), *aff'd* 908 F.2d 1308, *aff'd* sub. nom. *Chapman v. United States, supra*, 500 U.S. 453.

The Commission determined that amendment 488 could be applied, at judicial discretion, to persons seeking retroactive sentence reductions under 18 USC § 3582(c)(2), [USSG *Manual* App. C, Amend. 502, *eff.* 11/1/1993 as USSG § 1B1.10(c)]. Neal moved in pro se for such a reduction on December 10, 1993. (R. 78) Neal contended that the weight of his LSD, as calculated in accordance with amended USSG § 2D1.1(c), was 4.58 grams. Neal sought to apply this reduced weight to the penalty statute, [§ 841(b)(1)], as well as to ascertainment of his base offense level under the guidelines; "the statutory penalty for an offense involving 4.28 (sic)[4] grams of LSD is set forth in 21 USC § 841(b)(1)(B)(v) and it provides for a mandatory minimum sentence of 5 years." (R. 78:3-4, ¶¶ 7-8). At his resentencing hearing on March 28, 1994, Neal's appointed counsel reiterated that "the weight in the guidelines should be applied to the mandatory minimum." (Tr. 3/28/1994 at 8:6-8)

The district court granted Neal's motion in part and denied it in part. Applying amendment 488 retroactively, the court recalculated Neal's base offense level at 28 and his adjusted guidelines range at 25,[5] correlating to a guidelines sentencing range of 70 to 87 months. (Updated PSR at 4-5; Tr. 3/28/1994 at 9:16-10:5) However, over Neal's objection, the court declined to impose a sentence in this range and instead imposed the statutory minimum

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[4] Neal's typographical error (4.28 instead of 4.58 grams) does not alter the sentence calculation.

[5] On resentencing, the court awarded a *three* point adjustment for acceptance of responsiblity instead of the two points Neal originally received; the Government did not cross-appeal. (Tr. 3/28/1994 at 10).

of ten years (120 months).[6] In a written opinion, the court explained that amended USSG § 2D1.1(c) fn. * applied only to ascertaining drug quantity for *guidelines* purposes, while quantity calculations for purposes of the *statute* remained governed by the gross weight formula in *Chapman*. *United States v. Neal, supra,* 846 F.Supp. 1362.

Neal appealed to the Court of Appeals for the Seventh Circuit, which affirmed the judgment of the district court in an *en banc* decision with three judges dissenting. *United States v. Neal, supra,* 46 F.3d 1405. The Court acknowledged that "[u]nder the district court's interpretation of federal law, a single amount of LSD is assigned two different weights for sentencing purposes," [*Id.* at 1408], one weight for guidelines calculations and the other for ascertaining eligibility for any mandatory minimum sentence; however, the Court believed that Congress intended this paradox because it envisioned the guidelines and the statutory minima to be different sentencing schemes. *Id.* at 1411. According to the Court, the Sentencing Commission had neither the power nor the intention of using a Guidelines amendment to overturn § 841(b)(1), which had already been dispositively construed in *Chapman* as requiring gross weight sentencing in LSD cases. The Commission had explicitly limited the scope of its amendment to calculation of "base offense level" under the guidelines and stated, in commentary which cited *Chapman*, that the amendment "does not override the applicability of 'mixture or substance' for

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[6] Pursuant to USSG § 5G1.1(b)(2), the court found the proper guidelines sentence to be the mandatory minimum sentence. (Tr. 3/28/1994 at 10:18-19)

purposes of applying any mandatory minimum sentence." Therefore, "[u]ntil the Supreme Court or Congress revisits the issue, *Chapman* governs the meaning of the term 'mixture or substance'." *Id.* at 1408-1409, citing *United States v. Boot*, 25 F.3d 52, 55 (1st Cir. 1994).[7]

Judges Ripple, Cummings, and Rovner dissented, criticizing the reasoning of the majority opinion as "circuitous" *Id.* at 1411. The Commission possesses "statutory authority to set sentencing ranges." *Id.* at 1412. Promulgation in the wake of *Chapman* of "a refinement of the earlier practice of weighing on an ad hoc basis whatever carrier the defendant happened to use," [*Id.* at 1416], was consistent with Congress' intention that the Commission would "periodically review the work of the courts, and would make whatever clarifying revisions to the guidelines conflicting judicial decisions might suggest." *Id.* at 1416, citing *Stinson v. United States*, 508 U.S. ___, 113 S.Ct. 1913, 1919 (1993). In § 841(b)(1), as interpreted in *Chapman*, Congress adopted a "market" model which based sentences on quantities of drugs in the form in which they are actually sold. However, application of this model to LSD produced sentencing disparities which the Commission was created to reduce. By "simply assign[ing] a rational and uniform weight" to the portion of LSD carrier actually mixed with the drug, the Commission rendered LSD sentences less disparate while retaining the essence of the "market" model. *Id.* at 1415-1416. In this respect, the Commission's assurance that its amendment

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[7] The Court also rejected Neal's claim that a 'dual weight' sentencing system violates the Constitutional guarantee of due process, and declined Neal's invitation to invoke the "rule of lenity" on grounds that 'dual weight' sentencing is not ambiguous. *Id.* at 1410

did "not override" *Chapman* merely stated the obvious, and the majority's conclusion that the Commission thereby meant to embrace a 'dual weight' system was "without any heed to [the] context", [*Id.* at 1413], of the Commission's commentary.

Neal's timely petition for *certiorari* was granted on June 19, 1995.

Summary of Argument

Introduction

In the Sentencing Reform Act, Congress delegated to the United States Sentencing Commission the task of assuring proportionate sentencing in Federal criminal cases. The Commission accomplishes this task by fact-finding and rulemaking procedures, including the publication of sentencing guidelines "intended to treat all classes of offenses committed by all categories of offenders consistently." S. Rep. 98-225 (S. 1762) at 51 (1983). The guidelines are adopted in partnership with Congress, which has reserved for itself six months in which to disapprove of any guideline or amendment promulgated by the Commission. The resulting guidelines are *binding* on judges, who *must* sentence in accordance with them absent permissible grounds to do otherwise. The guidelines conform to elaborate policy criteria set out by Congress and must fall within the limits of sentencing statutes passed by Congress.

One such sentencing statute, 21 USC § 841(b)(1)(A), (B), sets mandatory penalties for listed quantities of "a mixture or substance containing" various drugs including LSD. In *Chapman v. United States, supra*, 500 U.S. at 461,

this Court construed "mixture . . . containing" to encompass "blotter paper customarily used to distribute LSD." This "gross weight" approach to sentencing in LSD cases sanctioned sentences which are both proportionately longer in LSD cases than those for trafficking in other drugs (because the ratio of LSD to carrier is greater than is the case of most other drugs), and disproportionate amongst LSD traffickers (because the weight of LSD carriers varies widely).

Pursuant to its mandate to eliminate unwarranted sentencing disparity, the Commission responded to *Chapman* in 1993 by amending the Sentencing Guidelines to establish a presumptive and uniform weight per *dose* of blotter-mounted LSD. This made for shorter and more proportionate LSD sentences. At issue in this case is whether the Commission's amendment governs calculation of the statutory minimum sentences for LSD distribution.

I

Guidelines Amendment 488 was intended to, and *does*, pertain to LSD-weight calculations under both USSG 2D1.1(c) n. "*" and 21 USC 841(b)(1), and this result is permissible under the Sentencing Reform Act.

(A) In the Sentencing Reform Act, Congress created an expert administrative agency, the Sentencing Commission, and delegated to it the task of promulgating a "consistent sentencing philosophy", [S. Rep. 98-225, *supra*, at 51], by way of a guidelines system that "establish[es] sentencing policies and practices for the Federal criminal justice system." 28 USC § 991(b)(1). Congress has directed the Commission to accomplish this task by promulgating mandatory sentencing guidelines based on,

amongst other factors, categories of offenses. 28 USC § 994(a)(1), (b)(1). Pursuant to this delegation of authority, the Commission has routinely set up "sentencing practices" based on, for example, quantities of money lost or controlled substances involved. E.g., USSG §§ 2B3.1(b)(6); 2F1.1(b)(1); 2D1.1(c). Courts have never questioned the authority of the Commission to set these penalty-tiers even when they are based on interpretations of or improvisations on relevant penalty statutes. In the specific area of drug sentencing, the Courts have held that the Commission has authority to define and construe statutory terms referencing the drug mixtures which are penalized under 21 USC § 841, and to instruct courts as to how to sentence in accordance with the Commission's definitions; the courts have sustained the Commission in so doing even where the Commission's approach is not facially consistent with the text of the statute. E.g., *United States v. Shabazz*, 933 F.2d 1029 (D.C. Cir.), cert. den., 112 S.Ct. 431 (1991). In promulgating amendment 488 to USSG § 2D1.1(c) fn. *, the Commission utilized this familiar power to construe a term of art relative to calculating drug quantity.

(B) No legal principal suggests that the authority of the Commission in this regard is altered by the presence of a minimum penalty provision in the statute. The minimum sentences passed as part of the Narcotics Penalties Enforcement Act of 1986 did not explicitly diminish the rulemaking authority of the Commission, and repeals by implication are not favored. There is no inevitable conflict between Commission rulemaking and the system of mandatory minimums; Circuits routinely use Guidelines concepts to determine eligibility for mandatory minimum sentences. E.g., *United States v. Irvin*, 2 F.3d 72, 78 (4th

Cir.), cert. den., 114 S.Ct. 1086 (1993) (collecting cases). While the Commission is not empowered to rewrite a statute, its guidelines nonetheless "bind judges and courts", [*Mistretta v. United States*, 488 U.S. 361, 391 (1989)], on sentencing issues. Here, without touching the statute, the Commission reinterpreted a term of art shared by a guideline and a sentencing statute and thereby redefined the term for statutory purposes. Such rulemaking remains the normal task of the Commission and the amendment should be applied to the statute.

(C) Application of the Commission's rule to the statute is controversial – *not* because the statute precludes the Commission's definition, but because this Court already construed the statute differently in *Chapman*. Amendment 488 is "in conflict" with the statute *only* to the extent that it is in conflict with the *Chapman* construction of the statute. Respectfully, however, this Court should permit the amendment to apply to the statutory penalty provision, notwithstanding *Chapman*, out of deference to *Congress* because the Commission's new rule amounts to the latest statement of Congressional intent on the LSD-weight issue. Congress, which retains an unusual oversight and partnership arrangement with the Commission during the amendment process, [28 USC §§ 994(o),(p)], *approved* of the amendment by failing to modify or override it within the statutory period it reserved for itself to do so. Congressional acceptance of the amendment was tantamount to a Congressional "override" of the gross-weight method for LSD penalty calculation. Such an "override" need not assume the form of explicit legislation in the case of amendment 488. The text of the statute did not need to be altered to effectuate the change, and rulemaking of the sort done here is

precisely how Congress *intended* the Sentencing Reform Act to function. *United States v. Muschik*, 49 F.3d 512, 517 (9th Cir. 1995) (concerning amendment 488); *United States v. Munoz-Realpe*, 21 F.3d 375, 377 (11th Cir. 1994); *United States v. Lueddeke*, 908 F.2d 230, 233 (7th Cir. 1994).

(D) The Commission's Commentary that its "approach does not override the [*Chapman*] definition . . . for purposes of applying any mandatory minimum sentence" does not defeat the foregoing analysis. The comment may merely mean that the Commission saw no inconsistency between its rule and that in *Chapman*; other amendments promulgated by the Commission at the same time as amendment 488 fortify this assertion. At most, the commentary is inconsistent with the guideline, and therefore is of no force. *Stinson, supra*, 113 S.Ct. at 1918.

(E) The definition of crimes and the establishment of penalties is ultimately a *legislative* function. *Whalen v. United States*, 445 U.S. 684, 689 (1980). Congress has chosen to define crimes and structure penalties for Federal offenses by way of an elaborate but constitutionally valid system in which substantial factfinding and rulemaking authority is vested in the Sentencing Commission under the oversight of and in partnership with Congress. In Amendment 488, this system properly effected a *de facto* revision of the gross-weight definition of "mixture" in LSD cases. Out of deference to the power of *Congress*, this Court should approve of application of the new definition to all phases of criminal sentencing, as Congress has ordained.

II

Even if Amendment 488 did not, or cannot, directly affect the method for calculating drug quantity under the penalty statute, this Court should revisit *Chapman* in light of the Commission's expertise and persuasive authority.

(A) When *Chapman* was decided, the Commission had not yet interpreted the term "mixture containing . . . LSD", and the phrase had no common law definition, [*Chapman, supra,* 500 U.S. at 461-462]; this Court was compelled to adopt the "ordinary meaning" of the phrase, [*Chapman, supra,* 500 U.S. at 462], and ascertain to which of the two alternatives presented – the speck of pure LSD or the gross assemblage of LSD and carrier – it best pertained. Given that LSD "mixture" could not refer to *pure* LSD, and given the "market-oriented" penalty theory underlying the 1986 amendment to 21 USC § 841(b), [H.R. Rep. 99-845, pt. 1, pp. 11-12], this Court necessarily construed the phrase as referring to the gross weight of LSD and carrier. However, this Court's construction of the statute is not the *only* plausible one nor the only one in harmony with the policies underlying the penalty statute. The purpose of the 1986 Narcotics Penalties Enforcement amendments was to define drug distribution in the form in which drugs are commonly marketed, thereby differentiating between offenders at different rungs of the marketing chain so that law enforcement resources could be targeted at higher-tier offenders. The Commission's amendment serves this purpose even better than does "gross weight" sentencing. By weighing some of the blotter paper, it punishes LSD trafficking in the form in which LSD is marketed; at the same time, it eliminates the practice of misdirecting law

enforcement resources against small scale dealers whose offenses are bloated by the deceptive heaviness of LSD carriers. Moreover, the amendment is not inconsistent with the *language* of the statute, which predicates punishment on the weight of *a* "mixture or substance" and not on the weight of *the* heaviest possible "mixture."

(B) The primary goal of the Sentencing Reform Act, and of the Commission established pursuant to it, was to establish proportionality in sentencing by eliminating unwarranted sentencing disparities; the uniformity to be achieved through determinate sentencing was *reasonable* uniformity through elimination of unwarranted disparity, not the sham uniformity of "one size fits all" sentences. 28 USC §§ 991(b)(1)(B), 994(f); *see,* S.Rep. 98-225, *supra,* at 52. Cramping virtually all LSD sentences into two mandatory minimum sentences creates a sham uniformity at the expense of unwarranted disparity. It is the statutory duty of the Commission to attempt to alleviate disparity, and this was the goal behind amendment 488. Now that amendment 488 has eliminated disparity in *guidelines* sentences, it is the duty of Courts to interpret the penalty statute so as to eliminate such disparity with regard to minima as well.

Moreover, Congress intends that its various sentencing enactments be considered part of a comprehensive sentencing policy. 18 USC § 3553(a)(5)-(6); S. Rep. 98-225, *supra,* at 50-52. Congress did *not* intend to dichotomize between guidelines and penalty statutes, and did not intend that LSD sentences be internally inconsistent amongst themselves or unwarrantedly longer than sentences imposed for other equally dangerous drugs. In promulgating amendment 488, the Commission acted pursuant to *this* mandate as well. Again, however, gross-

weight mandatory minimum sentencing frustrates the goal of achieving a cohesive sentencing policy; the solution to such frustration is application of the fixed-weight calculation method of amendment 488 to ascertainment of eligibility for the statutory minimum.

(C) The Sentencing Commission is an expert administrative agency and thoroughly equipped to shed light on technical questions such as the definition of "mixture or substance" under the penalty statute. Using its expertise and fact finding powers, the Commission has promulgated a such statutory interpretation here, and its approach harmonizes the "market oriented" penalty structure of 21 USC § 841(b)(1) with the command in the Sentencing Reform Act that unwarranted sentencing disparities be eliminated, [18 USC § 3553(a); 28 USC §§ 991(b)(1)(B), 994(f)]. Courts traditionally defer to rational statutory interpretations by which agencies fill in "statutory gaps". *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). While *Chevron* does not "fit" precisely in this case because the statute at issue is a penal and not a regulatory one, the Commission is *a judicial* agency and its rulemaking may therefore be binding on courts on sentencing matters. At any rate, the Commission's amendment evidences considerable wisdom, and this Court should voluntarily reassess *Chapman* in light of such wisdom.

The foregoing doctrine applies even though Commission rulemaking comes in response to a decision by this Court rather than prior to it. Congress *intended* that Commission rulemaking would respond to judicial decisions, rather than necessarily anticipating them. *Braxton v. United States*, 500 U.S. 344, 348 (1991). Only when agency rulemaking discards longstanding judicial interpretations

limiting the scope of agency authority will *stare decisis* be invoked to cancel it. E.g., *California v. F.E.R.C.*, 495 U.S. 490, 497-500 (1990).

(D) Although amendment 488 conflicts with one technical aspect of the *Chapman* holding – that *all* of the customarily used blotter paper must be weighed in ascertaining eligibility of the offender for a mandatory sentence – this one portion of *Chapman* should be reconsidered in light of the other and more important statutory goals referenced above, including the all important goal of rationalizing sentencing, where possible, under the supervision of an expert Commission which is, in turn, supervised by Congress.

III

Should this Court decline to revisit *Chapman*, it should nevertheless find that the Commission's redefinition of "mixture" is not inconsistent with *Chapman*, and therefore can be used by Courts in calculating minimum sentences.

(A) Congress empowered the Commission to normalize sentencing practices by, *inter alia*, filling definitional "gaps" in the statute. This Court's construction of LSD "mixture" as consisting of "blotter paper customarily used to distribute LSD" as a "mixture" created such a definitional "gap" as to what paper is "customarily used". Closing the "gap" was important to the Commission since this paper weights vary widely, thus impacting on sentencing. *Chapman, supra*, 500 U.S. at 458, fn. 2; USSG § 2D1.1(c) Commentary: Background ¶ 7. The Commission solved the problem by setting a presumptive dose-based weight for blotter paper.

(B) Only the portion of blotter paper actually containing LSD particles is an LSD "mixture", the weight of which determines eligibility for mandatory penalties. The Commission has defined this portion to be .04 milligrams of each LSD-soaked quarter inch square of paper. The new definition is consistent with *Chapman* and therefore controls weight calculations under the statute.

Argument

Introduction: The Sentencing Commission and Its Powers

Although this case is a logical sequel to this Court's opinion in *Chapman v. United States*, 500 U.S. 453 (1991), the two cases involve different aspects of the law. *Chapman* was concerned with the *minutiae* of substantive criminal legislation. *This* case, on the other hand, is about the unique partnership between Congress and the agency created by it to supervise Federal sentencing policy.

The United States Sentencing Commission was created by Congress in 1984 to "promulgate and distribute to all courts of the United States . . . (1) guidelines . . . for use of a sentencing court in determining the sentence to be imposed . . . . [and] (2) general policy statements regarding application of the guidelines *or any other aspect of sentencing or sentence implementation* that in the view of the Commission would further the purposes set forth in section 3553(a)(2)[8] of title 18, United States Code." 28 USC § 994(a). Congress vested "extraordinary powers", [S. Rep. 98-225, *supra*, at 160], in the Commission to act in

[8] Section 3553(a)(2), [exhibit "C"], is the all-purpose directive that criminal sentences be just and proportionate.

this regard, authorizing it do no less than "*establish sentencing policies and practices for the Federal criminal justice system.*" 28 USC § 991(b)(1). Guidelines promulgated by the Commission are *binding* on the Federal courts in passing sentences, [18 USC § 3553(a)(4), (b)]; *Stinson v. United States, supra,* 113 S.Ct. at 1917; *Burns v. United States*, 501 U.S. 129, 133 (1991)], and are deemed to "establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code."[9] 28 USC § 994(b)(1). The Commission is empowered to amend guidelines, subject to Congressional approval, as it sees fit and *retroactively*.[10] 28 USC §§ 994(o),(p),(u).

A primary task for the Commission is the elimination of "unwarranted disparities among defendants with similar records who have been found guilty of similar conduct." 28 USC § 991(b)(1)(B); S. Rep. 98-225, *supra*, at 52. Congress intended the Commission to "constantly keep track of the implementation of the guidelines in order to determine whether sentencing disparity is effectively being dealt with," [S. Rep. 98-225, *supra*, at 178], and the former Chair of the Commission has written that elimination of disparity is "the immediate, pragmatic task – and one clearly of high priority" contemplated by Congress in

[9] The subdivision fails to mention Tit. 21, which contains the penalty provision at issue here, but "not every silence is pregnant," [*Illinois Dept. of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir., 1983)]. The "pertinent provisions" most likely are those pertaining to the mechanics of sentencing, rather than specific penalty provisions.

[10] This bespeaks great trust by Congress in the Commission's expertise, since "[t]he power to require readjustments for the past is drastic." *Brimstone Railway Co. v. United States*, 276 U.S. 104, 122 (1928); *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1989).

requiring the Commission to amend the Guidelines as needed. Wilkins & Steer, *"Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentence Disparity"* 50 Wash. & Lee L. Rev. 63, 69 (1993). The Commission must "pay particular attention" to this goal. 28 USC § 994(f).[11]

The instant case involves a guidelines amendment promulgated in furtherance of this goal. In *Chapman v. United States, supra,* 500 U.S. 453, 461, this Court construed the phrase "mixture or substance containing . . . LSD" to include "the blotter paper customarily used to distribute LSD." As a result, sentences for LSD trafficking remained disproportionately severe compared to those imposed for dealing other drugs. To restore proportionality, the Commission amended the Sentencing Guidelines to make LSD sentences commensurate to those for other drugs. The Commission was quite explicit that its motivation was to alleviate sentencing disparity; "[b]ecause the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances . . . . " USSG § 2D1.1(c) Commentary: Background ¶ 7).

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[11] Elimination of disparity is not merely a goal for the Commission, but is a principal to which each sentencing judge must adhere. 18 USC § 3553(a)(6).

At issue in this case is whether the Commission's reformatory amendment carries over to judicial determination of a defendant's eligibility for mandatory minimum sentencing. As appears below, it does.

There are three ways in which the Commission's amendment can be said to bind sentencing judges in calculating eligibility for mandatory minimum sentences under 21 USC § 841(b)(1). First, under the Sentencing Reform Act, amendment 488 constitutes the definitive, Congressionally sanctioned, definition of LSD "mixture", which supersedes the gross-weight definition heretofore attached to the statute; without authorizing the Commission to change the statute, Congress delegated to the Commission the task of interpreting the technical term "mixture . . . containing" *within the statute,* and the Commission did precisely what Congress permitted it to do. Second, the Commission possesses both meticulous technical knowledge and a wise and proportionate perspective on sentencing issues. It is therefore entitled to respect, even deference, in the courts. *This* Court can and should reassess aspects of the *Chapman* decision in light of the Commission's expert contribution on the issue. Finally, the Commission's new rule can simply be viewed as consistent with *Chapman*. Petitioner addresses these arguments in sequence.

I

PURSUANT TO THE UNIQUE PARTNERSHIP BETWEEN THE COMMISSION AND CONGRESS SET UP BY THE SENTENCING REFORM ACT, AMENDMENT 488 IS A 'CONGRESSIONAL ACTION' WHICH CHANGED THE DEFINITION OF "MIXTURE CONTAINING . . . LSD" FROM THAT SUGGESTED IN *CHAPMAN* TO THAT ARTICULATED IN THE GUIDELINES AMENDMENT

(A) The Commission Possesses Broad Power to Define Statutory Terms Relevant to Sentencing

The Sentencing Reform Act was the bipartisan "culmination of a reform effort begun more than a decade" earlier. S. Rep. 98-225, *supra*, at 37. To replace the ad hoc and disparate practices of indeterminate sentencing, Congress delegated an expert Commission the task of promulgating a comprehensive code of mandatory guidelines and equipped the Commission with substantial tools and powers to perform the task. *Id.* at 51; 28 USC §§ 994, 995. While delegation to the Commission was very broad, "[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate." *Mistretta v. United States, supra,* 488 U.S. at 379.

The Commission was instructed by Congress to *"establish sentencing policies and practices"*, [28 USC § 991(b)(1)], and to develop a penalty structure correlating to offense and offender characteristics and tiered along comparatively narrow "ranges" of prison time. 28

USC § 994(b)(1),(2); USSG ch. 1, pt. A § 2, ¶ 2. Accomplishing these tasks necessarily involves interpretation by the Commission of the "meaning" of statutes defining and penalizing Federal offenses; without making an assessment in this regard, the Commission would be unable to set policies and practices or to isolate particular factors which render generic offense-conduct more or less serious in a given case. In drafting the guidelines, the Commission professedly "examined the many hundreds of criminal statutes in the United States Code . . . . developed additional distinctions relevant to the application of these provisions and . . . applied sentencing ranges to each resulting category." USSG ch. 1 Pt. A § 5 ¶ 1. For example, the Commission has, from the outset, set up penalty structures for various offenses based on quantities of money lost or stolen, aliens smuggled, or taxes evaded, even though such quantities are not part of the statutory definition of the crime or penalty. E.g., USSG §§ 2B3.1(b)(6); 2F1.1(b)(1); 2L1.1(b)(2); 2T4.1 (Tax Table). At least *some* of these penalty structures appear to be based not on normative assumptions about criminal law, but on the text of the penalty statutes. For example, increasing the offense-level for bank robbery on the basis of the amount of money stolen makes particular sense in that the "victim" of an 18 USC § 2113 violation is not the *teller* but the Federally-insured *bank*. No court has questioned the legitimacy of these penalty tiers, even when they result from interpolation and improvisation on statutes which do not facially mention them; to hold that the Commission lacked power to interpret penalty statutes would cripple the Commission's ability to set out "sentencing practices" by formulation of narrow, tiered guidelines based on "offense characteristics", thus

undermining the system contemplated by Congress in the Sentencing Reform Act.

As one instance of this prerogative, the Commission has established penalty tiers for drug offenses based on the quantity of drugs involved. Here, the Commission has freely utilized its interpretative powers, typically predicating penalties on quantities of drug mixtures involved in the offense even where the penalty statutes refer to drugs in their pure form. Nevertheless, the courts have sustained the Commission's rulemaking in this regard as consistent with its statutory mission. For example, in *United States v. Shabazz, supra,* 933 F.2d 1029, the Court in an opinion authored by then-Judge Thomas, upheld the Commission in basing the penalty for distributing hydromorphone, [21 USC § 941(b)(1)(C)], on the weight of *dilaudid,* a hydromorphone *mixture* which is marketed in varying doses of equal mixture-weight; that neither the penalty statute nor the statute controlling the drug, [21 USC § 812], made reference to hydromorphone mixtures was deemed to be irrelevant, since the omission was a 'statutory gap' which Commission properly filled. The reasoning in *Shabazz* has been unanimously accepted by the circuits which have considered the issue.[12] Courts

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[12] *United States v. Limberopoulos,* 26 F.3d 245, 252-253 (1st Cir. 1994); *United States v. Gurgiglio,* 894 F.2d 56 (3rd Cir. 1990); *United States v. Meitinger,* 901 F.2d 27, 29, (4th Cir.), cert. den., 498 U.S. 985 (1990); *United States v. Bayerle,* 898 F.2d 28 (4th Cir.), cert. den., 498 U.S. 819 (1990); *United States v. Blythe,* 944 F.2d 356, 362 (7th Cir. 1991); *United States v. Young,* 992 F.2d 207, 209 (8th Cir. 1993); *United States v. Crowell,* 9 F. 3d 1452 (9th Cir.), cert. den., 115 S.Ct. 120 (1993); *United States v. Lazarchik,* 924 F.2d 211, 214 (11th Cir.), cert. den., 502 U.S. 827 (1991).

have routinely reached similar results with reference to definitions of other drugs.[13]

These cases sanction the Commission's authority to define and construe technical terms within the drug penalty statute, 21 USC § 841(b)(1). Penalties for hydromorphone distribution can only be based on the weight of pills of equal weight containing varying amounts of hydromorphone if Congress "meant" for punishment to be scheduled in this way by the Commission, acting on its expertise. But this is exactly what Congress *did* mean in the Sentencing Reform Act. Construction of terms of art within a penalty statute, *any* penalty statute,[14] was intended by Congress as the Commission's quotidian activity – the way in which the Commission sets "sentencing practices" and defines "offense characteristics". When the Commission interpreted the term "mixture containing . . . LSD" here, it did nothing extraordinary; it merely lived up to its enabling legislation.

(B) The Commission's Power to Define Terms Of Art Is Not Diminished Merely Because A Penalty Statute Provides for a Minimum Sentence

No legal principal suggests that the Commission's power to construe terms-of-art in a penalty statute is

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[13] *United States v. McKeever,* 906 F.2d 129, 133 (5th Cir.), cert. den., 498 U.S. 1070 (1990) (methamphetamine); *United States v. Taylor,* 868 F.2d 125 (5th Cir. 1989) (LSD); *United States v. Murphy,* 899 F.2d 714 (8th Cir. 1990) (methamphetamine); *United States v. Callihan,* 915 F.2d 1462 (10th Cir. 1990) (amphetamine precursor).

[14] E.g., *United States v. Arate-Nunez,* 18 F.3d 730 (9th Cir., 1994) (clarifying 8 USC § 1101(a)(43) enhancement as it applies to and violation of 8 USC § 1326(b)(2)).

diminished by the mere presence of a minimum sentencing provision in such a statute. Of course, the Commission cannot amend a statute directly,[15] and must "speak" only through guidelines. However, the proper subject-area for guidelines is very broad. The Commission is directed to use guidelines to do no less than "establish sentencing policies and practices for the Federal criminal justice system," [28 USC § 991(b)(1)], – not just for those parts of the Federal system which do not involve minimum penalties.

There is no necessary incompatibility between guidelines and mandatory minimum provisions. The two "should be reconciled to the extent legitimate and practical." *United States v. Irvin*, *supra*, 2 F.3d at 78 (Wilkins, J.); *United States v. McFadden*, 13 F.3d 463, 467-468 (1st Cir., 1994) (Breyer, C.J., dissenting). Mandatory penalties already existed when the Sentencing Reform Act was passed and, indeed, two such penalties were passed along with the Act itself. 18 USC § 924(c); 21 USC § 845(b) (1982 ed. Supp. II), [Pub. L. 98-473 T. II §§ 503(a), 1005(a)]. Congress contemplated the Commission would administer various forms of penalty statutes, *including mandatory penalty laws*. S. Rep. 98-225, *supra*, at 66.

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[15] Thus, the question in this case is *not* whether the Commission can "override" the ten year minimum statute; courts which have posed the question in this form have defined the issue incorrectly and have therefore inevitably arrived at the wrong answer. E.g., *United States v. Neal*, *supra*, 46 F.3d at 1408-1409 (7th Cir.); *United States v. Stoneking*, 60 F.3d 399, 402 (8th Cir. *en banc* 1995); *United States v. Andress*, 47 F.3d 839, 840-841 (6th Cir. 1995); *United States v. Hanlin*, 48 F.3d 121, 125 (3rd Cir. 1995); *United States v. Boot*, 25 F.3d 52, 55 (1st Cir., 1994).

Passage of mandatory sentencing provisions as part of the anti-drug abuse Narcotics Penalty Enforcement Act of 1986, [P.L. 99-570, 100 Stat. 3207], did not purport to diminish the authority of the Commission. According to the legislative history, the core purpose of the mandatory penalty provisions was to focus scarce law enforcement resources by differentiating between "kingpins", "substantial" traffickers, and small time dealers. H.Rep. 98-845, *supra*, at 11-12. A short and euphoric Senate debate also made reference to greater and surer punishment. *E.g.*, 132 Cong. Rec. S. 27181 (Biden); S. 27193 (Byrd). Nowhere, however, was anything mentioned about limiting the power of the Sentencing Commission to interpret technical terms in penalty statutes. Repeals by implication are not favored, "and will not be found unless an intent to repeal is 'clear and manifest.' " *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) [citations omitted]. No clear statement of intent to repeal the Sentencing Reform Act accompanied the 1986 amendments.

Since mandatory penalties were enacted, moreover, courts have routinely used concepts developed by the Commission in its guidelines to ascertain eligibility for mandatory sentencing. For example, USSG § 1B1.3(a)(1)(B) provides that a defendant is responsible, under a "relevant conduct" theory, for foreseeable acts of those with whom he conspires; a number of courts have held that this "foreseeability" formula *also* applies to determining drug quantity for purposes of assessing a defendant's eligibility for a mandatory sentence under 21 USC § 841(b)(1)(a),(b), even though the "plain language" of the statute would suggest that each defendant is liable for the aggregate of drugs subject to the conspiracy,

"foreseeable" or not. *See*, e.g., *United States v. Irvin*, *supra*, 2 F.3d at 74-78; *United States v. Young*, 997 F.2d 1204, 1210 (7th Cir. 1993). No Circuit has disagreed with this approach.[16]

Nor could they. In none of these cases did the Commission exceed its statutory authority and purport to "amend" a statute; rather, the Commission acted *pursuant* to its directive to eliminate sentencing disparity and interpreted terms of art *within* the penalty statute with this aim in mind. This is precisely what the Commission is supposed to do, and the Courts properly followed the Commission's interpretations. To do otherwise would have dichotomized single instances of misconduct into 'misconduct under the statute', as opposed to 'misconduct under the guidelines'. Not only would this have been chaotic, but it would have frustrated *another* important goal of Sentencing Reform: the principled and uniform approach to sentencing set out in 18 USC § 3553(a)(2)].

United States v. Jordan, 842 F.Supp. 1031 (M.D. Tenn. 1994) is consistent with the approach taken in these cases. In *Jordan*, the defendants were arrested with a vial containing 13.2 grams of liquid, 0.022 grams of which was LSD, as well as with a quantity of LSD on blotter paper weighing just over seven grams. The Government sought to impose a mandatory sentence under § 841(b)(1)(A)(v), but the District Court refused. The Court noted that USSG § 2D1.1(c) App. n. 18 defined LSD in liquid as

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[16] E.g., *United States v. Madkins*, 14 F.3d 277, 279 (5th Cir. 1994); *United States v. Casteneda*, 9 F.3d 761, 769-770 (9th Cir. 1993); *United States v. Martinez*, 987 F.2d 920, 925 (2nd Cir. 1993); *United States v. Jones*, 965 F.2d 1507, 1517 (8th Cir.), cert. den., 113 S.Ct. 346 (1992).

"LSD that has not been placed on a carrier medium," and, applying this concept to the weight calculation in the case before it, arrived at a sentence weight of .022 grams of LSD.[17] *Id.* at 1033. The *Jordan* Court did not resolve the "conflict" between the statute and the guideline because it perceived no conflict to resolve; rather, it simply applied the Guidelines to its sentence calculus, just as § 3553(a)(4)(5) *commanded* it to do. *See*, also, *United States v. Turner*, 59 F.3d 481 (4th Cir. 1995) (reaching similar result).[18]

Jordan suggests that in promulgating amendment 488, the Commission did the same thing as it did with USSG § 1B1.1(a)(1)(B): it defined a term-of-art shared by the penalty statute and the guidelines in such a way as to harmonize the two penalty systems. The Commission did not purport to "amend" the statute and *need* not have done so to achieve its statutory aim. The Commission merely changed the "sentencing practice" of weighing *all* of the blotter paper in LSD cases and supplanted it with a new "practice" of assigning a fixed rational weight to such paper. Put another way, the Commission isolated-out the *real* "offense characteristics" in LSD cases and eliminated the extraneous 'characteristic' of paper-weight which had distorted the sentencing process in the past.

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[17] Alternatively, the Court ascertained the number of *doses* latent in the liquid suspension and, using the 0.4 mg. figure in the Guidelines, arrived at a sentence weight of 177.6 grams. *Id.* at 1034.

[18] The *Turner* Court acknowledged, but did not resolve, the "mandatory minimum problem" because the issue was not briefed and the case was remanded anyway.

This is precisely the task Congress delegated to the Commission; any lesser assessment of the Commission's role contravenes the plain text of the Sentencing Reform Act.

(C) The Commission's Amendment Redefined the Meaning of LSD 'Mixture' Notwithstanding *Chapman* Because Congress Approved of the New Definition

What makes this case different from the foregoing decisions is that *here*, the Commission does not write on a clean slate; this Court has already construed § 841(b)(1) in *Chapman* in a manner different from that advocated by the Commission. However, petitioner most respectfully suggests amendment 488 is applicable to the penalty statute notwithstanding *Chapman*, for reasons as follow.

Chapman construed a technical term in a penalty statute enacted by Congress. There is no question that *Congress* could, by articulating a different definition for that term, "override" *Chapman*, since the setting of criminal penalties is a Congressional function. *Whalen v. United States*, 445 U.S. 684, 689 (1980). That function can be delegated, however. *E.g., Touby v. United States*, 500 U.S. 160 (1991) [Attorney General can specify drug offenses]; *Yakus v. United States*, 321 U.S. 414 (1943) [OPA can criminalize price control violations]; *United States v. Grimaud*, 220 U.S. 506 (1911) [Agriculture Department can criminalize land use violations]; 10 USC § 856 [penalties under military Code can be set by executive]. The Sentencing Reform Act did not delegate the power to define crimes *per se*. Rather, Congress delegated to the Sentencing Commission broad power to establish sentencing norms and policies for the Federal courts. As indicated in § I(A), *ante*, included in the delegation was the power to define

"offense characteristics" with reference to and through interpretation of, penalty statutes. As with any delegation, Congress must set sufficiently definite standards over the agency's actions, [*Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 219 (1989); *National Cable Television Assn. v. United States*, 415 U.S. 336, 342 (1974)], or the delegation will fail to pass Constitutional muster. However, in *Mistretta v. United States, supra*, 488 U.S. at 379, this Court found that the elaborate substantive and precatory criteria set out in 28 USC §§ 994(b)-(o) " 'are wholly adequate for carrying out the general policy and purpose' of the [Sentencing Reform] act." (Citing *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940)).

Confidence that the Commission will act as a responsible delegate and will not exceed the scope of its delegation is rooted to a large degree in the unusual amount of Congressional oversight over the Commission provided for in the Sentencing Reform Act. 28 USC § 994(p) imposes a six month 'gestation' period between proposal of a guideline amendment by the Commission and its ultimate promulgation; the amendment cannot go into effect if Congress modifies or bars it during that interval. The Commission "is fully accountable to Congress which can revoke or amend any or all of the Guidelines as it sees fit." *Mistretta, supra*, 488 U.S. at 393-394. In *Stinson v. United States, supra*, 113 S.Ct. at 1918, this Court stated that although promulgation of guidelines was akin to ordinary agency rulemaking, "the analogy is not precise because Congress has a role in promulgating guidelines." Other Courts have described Congress' role in the

amendment process as sufficient to render the amendments "subsequent Congressional action."[19] *United States v. Munoz-Realpe, supra,* 21 F.3d at 377. Congressional acquiescence to an amended guideline means that "Congress itself thought the Guidelines were not inconsistent enough with its mandate . . . so as to require change."[20] *United States v. Leuddeke, supra,* 908 F.2d at 233. At any rate, it is clear that Congress has a close, almost osmotic relationship to the Commission in the amendment process, and the Commission "speaks" for Congress to an unusual degree in the substantive content of its guidelines amendments.[21] For this reason, the Court in *United States v. Muschik, supra,* 49 F.3d at 515-516 held that

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[19] Petitioner is mindful that the Second Circuit rejected this view in *United States v. Palacio,* 4 F.3d 150 (2nd Cir.), cert. den., 114 S.Ct. 1194 (1994). *Palacio* is less persuasive than *Munoz-Realpe*. *Palacio* relied on a phrase in *United States v. Smith,* ___U.S.___, 113 S.Ct. 2050, 2055 (1993) – "the dubious assumption that the Sentencing Guidelines are relevant in the present context" – to imply that the Commission's interpretation of a statute is not entitled to deference. This contradicts the unanimous view of the Circuits including the one which decided *Palacio*. [§ I(A),(B) *ante*]. *Smith* did not even involve the *issue* of whether the Commission can interpret statutory terms of art.

[20] Even without the unusual oversight provisions of § 994(p), "Congress' failure to repeal or revise in the face of . . . administrative interpretation has been held to contribute persuasive evidence that that interpretation is the one intended by Congress." *Zemel v. Rusk,* 381 U.S. 1, 11 (1965).

[21] Congress' sentencing legislation is, in turn, influenced by the Commission, which must recommend changes in existing law "whenever it finds it advisable". 28 USC § 994(r). Congress can also avail itself of the Commission's various investigatory and factfinding activities with regard to Federal sentencing. 28 USC § 995(a).

amendment 488 was applicable to § 841(b)(1) because it represented the views of Congress.

In summary, with the passage of the Sentencing Reform Act, Congress explicitly delegated to the Commission the power to interpret penalty statutes so as to establish "offense characteristics" under the guidelines. However, Congress reserved for itself the power to cancel *any* guideline which it felt exceeded the scope of the delegation or which did not substantively reflect the sense of Congress. Congress did not interfere with the new definition of "mixture" promulgated by the Commission. It is fair to conclude that Congress sanctioned rulemaking by the Commission which defined a term-of-art in a mandatory penalty statute, *and* that Congress approved of the substantive content of the rule. Without the need for formal revision of 21 USC §§ 841(b)(1)(A), (B), amendment 488 should therefore be used in calculating eligibility for mandatory minima under that statute.

(D) Commission Commentary that Amendment 488 Does Not "Override" *Chapman* Should Not Be Interpreted to Negate The Substantive Impact of the Guideline Itself

Commentary of the Sentencing Commission is given dispositive weight unless in conflict with the Constitution, the statute, or the guideline itself. *Stinson v. United States, supra,* 113 S.Ct. at 1918-1920. In Commentary annexed to amendment 488, the Commission stated that it "has established a weight per dose of 0.4 milligram for purposes of determining the *base offense level* (emph. added), and that its "approach does not override the applicability of 'mixture or substance' for purposes of applying any mandatory minimum sentence, (*see,*

Chapman; § 5G1.1(b)). According to the Court of Appeals, this Commentary means that "the Commission promulgated Amendment 488 in full recognition that it would create a 'dual weight' system of calculating the weight of LSD." *United States v. Neal, supra,* 46 F.3d at 1408. As such, "[e]ven if an amendment to the Sentencing Guidelines could supersede the Supreme Court's interpretation of a separate statute, these two sentences make clear that the amendment to § 2D1.1 purported to do no such thing." *Id.,* at 1409.[22]

However, "[t]he sentence is obscure. What the Commission meant by it is difficult to fathom." *United States v. Kinder,* 95 US App. LEXIS 22592 at 35-36 (2nd Cir. No. 94-1333, Aug. 16, 1995), (Leval, J., dissenting). To the dissent in *Neal* below, the Commentary was primarily a factual observation that amendment 488 was not inconsistent with the core holding of *Chapman* that some portion of the carrier be included in the sentence calculus so as to reflect the "market oriented" premise behind the mandatory minimum statute. *Neal, supra,* 46 F.3d at 1412, 1413-1415. For Judge Leval in *Kinder, supra,* 95 U.S. App. LEXIS 22592 at 35-36, "the sentence signifies merely a recognition by the Sentencing Commission of the limits of its authority and undertaking . . . a recognition that however the courts interpret the mandatory sentence statute, its command will of course prevail over guideline

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[22] *See,* also, *United States v. Kinder* (No. 94-1333, 95 US App. LEXIS 22592, at 5) (2nd Cir. August 16, 1995); *United States v. Andress,* 47 F.3d 839, 840-841 (6th Cir. 1995); *United States v. Pardue,* 36 F.3d 429, 431 (5th Cir. 1994), cert. den., 115 S.Ct. 1969 (1995); *United States v. Boot, supra,* 25 F.3d at 55; *United States v. Stoneking,* 60 F.3d 399, 402-403 (8th Cir. *en banc*), cert. pending, (1995); *Woolston v. United States,* 840 F.Supp. 1, 2 (D.Me. 1993).

prescriptions." The four dissenting judges in the Eighth Circuit considered the sentence in context of the full Commentary, as well as contemporaneous amendments, as meaning simply that the Commission intended to adhere to *Chapman. Stoneking, supra,* 60 F.3d at 408, Beam, J., dissenting.

This is probably an accurate observation. Contemporaneous with its adoption of amendment 488, the Commission promulgated another amendment, [USSG *Manual* App. C amend. 484 eff. 11/1/1993 as USSG § 2D1.1 App. Note 1], which exempted from the definition of "mixture" drugs rendered temporarily useless by being "mixed" with other substances such as packaging materials or waste. Some circuits had ruled that the entire weight of these useless amalgams should be included in the mandatory sentence, but the Commission felt that nonusable amalgams should not be weighed because they had no "market-oriented" value *within the meaning of Chapman.* Amendment 488, which includes some but not all LSD carrier as a result of "market-oriented" analysis, is consistent with the Commission's view of *Chapman.* It is very likely that *this* is all that the Commission meant when it said that it did not intend to "override" *Chapman*; certainly, the odd locution of the "not override" passage does not suggest otherwise. It is also noteworthy that amendment 484 begins with the statement that " 'mixture or substance' as used in this guideline has the same meaning as in 21 USC § 841, *except as expressly provided.*" (emph. added). Whatever else it does, the Commentary to amendment 488 does not "expressly" differentiate between LSD weight for statutory and guidelines purposes. This indicates that the Commission did not intend to make such a differentiation.

Only if read "without any heed to context," [*Neal, supra,* 46 F.3d at 1413, Ripple, J., dissenting; *Stoneking, supra,* 60 F.3d at 408, Beam, J., dissenting], can the two passages in the Commentary be construed to undermine the elaborate factfinding and thoughtful rulemaking by which amendment 488 was promulgated. The Commission was surely mindful that Congress ratified the *guideline*, not the Commentary, and that commentary which contravenes a guideline is void, [*Stinson, supra,* 113 S.Ct. at 1918]. "What earthly sense would it then make for the Commission to command that courts not use this enlightened method when formulating statutory sentences?" *Kinder, supra,* 95 US App. LEXIS 22592 at 37, (Leval J., dissenting). Isolated fragments in the Commentary ought not to overwhelm the plain applicability of the guideline to sentence calculation under 21 USC § 841(b)(1).

(E) Summary: Amendment 488, Which Reflects the Sense of Congress On the Authority of the Commission and Regard to the Meaning of "Mixture", Should Govern Calculations Under the Statute

The definition of crimes and the establishment of penalties is ultimately a *legislative* function. *Whalen v. United States, supra,* 445 U.S. at 689. But Congress cannot suspend the business of the nation to pass new legislation every time a technical ambiguity or court case crops up concerning a penalty statute.[23] That is why Congress

[23] It is unlikely that Congress would view the blotter paper issue as big enough to warrant special legislation; the Commission reports only about 200 LSD cases in the Federal courts during fiscal years 1992-1993 and 1994. USSC Annual Reports,

created the Sentencing Commission. To prevent the Commission from overreaching, Congress has reserved for itself a degree of oversight unusual if not unique in administrative jurisprudence. Using that oversight, Congress allowed amendment 488 to take effect.

The amendment was a model for Commission rulemaking. The result of careful investigation, it secured proportionality (the aim of the Sentencing Reform Act), even as it secured a "market-oriented" approach to penalty (as ordained by the penalty statute and *Chapman*). Sentencing reform cannot work unless the Commission is permitted to interpret penalty statutes so as to promulgate meaningful and proportionate guidelines based on characteristics of the offense. The alternative is a full time Sentencing Congress or ad hoc chaos in the courts. This Court should adhere to Congress' multifaceted intent, and reverse the judgment of the Seventh Circuit.

II

THIS COURT SHOULD REVISIT *CHAPMAN* IN LIGHT OF THE COMMISSION'S EXPERT RULEMAKING AND ADOPT AMENDMENT 488 AS THE DEFINITIVE CONSTRUCTION OF "MIXTURE . . . CONTAINING" WITHIN THE MEANING OF 21 USC 841(b)(1)(A), (B)

Whether or not the Sentencing Commission has the *power* to command application of its guideline to calculation of the mandatory minima in 21 USC § 841(b)(1),

pp. 137, 154 Tables 52, 63 (1993), p. 105 Table 44 (1994). LSD offenses account for just over 1% of all Federal drug crimes. *Id.* (1994 ed.) at 40.

"courts may [nonetheless] borrow wise solutions promulgated by the relevant administrative agency in determining a closely related issue." *United States v. Kinder, supra,* 95 US App. LEXIS 22592 at 39, Leval, J., dissenting. The Commission's reinterpretation of the technical term "mixture or substance containing . . . LSD" was a "wise solution" to the sentencing disparity and debasement of Congress' 1986 "market" model caused by gross weight sentencing in LSD cases. Gross weight sentencing was sanctioned by this Court in *Chapman* before the Commission applied its expertise to the technical and policy problems caused by it. Now that the Commission has spoken to the issue, petitioner respectfully requests this Court to reconsider aspects of its *Chapman* holding.[24]

(A) The Construction Adopted By This Court in *Chapman* Is Not The Sole Plausible Construction of the Statute

This Court's interpretive options in *Chapman* were limited by the question actually posed in that case. The statutory question in *Chapman* was whether carrier media should be included in the weight of the "mixture or substance containing . . . LSD" for sentencing purposes under 21 USC § 841(b)(1). (*Chapman,* Pet. Cert. at i; Pet. Br. at i, 9, 44) Since the statute did not itself define "mixture or substance" and the phrase had no established common law meaning, this Court had to resolve the question by looking at the ordinary meaning of the

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[24] Various Courts of Appeals which have ruled on the instant issue have also suggested that this Court might wish to reconsider *Chapman*. E.g., *Kinder, supra,* 95 U.S. App. LEXIS 22592 at 9; *Neal, supra,* 46 F.3d at 1409; *Boot, supra,* 25 F.3d at 55.

words. *Id.* at 461-462. Because "mixed" *cannot* mean "pure," Chapman's contention that "section 841(b) should not require that the weight of the carrier be included," [*Id.* at 458], was simply not "plausible." *Id.* at 459. This Court did *not* purport to explore or exhaust the range of other plausible interpretations of the phrase. Rather, this Court resolved the case actually before it, holding that the petitioners could not prevail because the statute was susceptible of dictionary interpretation and suffered no "grievous ambiguity or uncertainty." *Id.* at 463 (citation omitted).

The statutory interpretation at which the Commission arrived was *as* reasonable and *as* consistent with Congressional intent as was the gross-weight "dictionary" approach sanctioned in *Chapman*. As did this Court in *Chapman, supra,* 500 U.S. at 461, the Commission started with the premise that "Congress took a 'market-oriented' approach to punishing drug trafficking under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence." Using its expertise, the Commission went beyond gross weight sentencing so as to conform LSD sentences even more to market *realities*. Specifically, the Commission chose to weigh *some* of the LSD carrier "[b]ecause LSD is marketed and consumed orally on a carrier medium." USSG § 2D1.1(c) Commentary: Background ¶ 8. However, because the actual weight of the carriers varies widely and LSD can be carried on heavy non-traditional carriers, [*Id.*; *Chapman, supra,* 500 U.S. at 458; *see, United States v. Lowden,* 955 F.2d 128 (1st Cir. 1992) (LSD in water)], the Commission felt it

rational to assign a fixed presumptive weight lest adventitious variations in carrier weight from case-to-case distort Congress' overall intent that drug penalties be based on the *realities* of the market.

This approach is thoroughly in accord with settled principles of statutory interpretation. "Plain meaning" of legislation is to be ascertained in the context of "the language and design of the statute as a whole." *Crandon v. United States*, 494 U.S. 152, 158 (1990); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 714, 722-723 (1989). *"A"* mixture containing LSD need not be equated with *"the"* heaviest possible amalgam of drug and carrier when the expansive interpretation yields results which warp the statutory design. The Commission's contextual interpretation of § 841(b)(1) is, if anything, *closer* to the statutory design than is gross weight sentencing.

(B) Congress Desires That Criminal Sentencing Be *Proportionate* and Consistent. Amendment 488 Serves This Goal, but Restricting Its Rule to the Guidelines Results In Worse Distortion Than Before

A deeper "context" for the 1986 Anti-Drug amendments can be found in the Sentencing Reform legislation passed only two years earlier and contemplated to govern *all* Federal sentencing practices, including mandatory minimum penalties.

The Sentencing Reform Act climaxed a decade-long Congressional effort to attain a just and uniform sentencing policy.[25] However, the resulting legislation

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[25] *See*, gen., Nagel, *Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines* 80 J. Crim. L. &

commanded neither pure "justice"[26] nor absolute "uniformity"; the statutory directive to the Commission was to achieve *proportionality* through the reduction of unwarranted sentencing disparity. 18 USC § 3553(a)(2); 28 USC §§ 991(b)(1)(B), 994(f). When passing sentence, judges *must* attempt to avoid unwarranted disparity. 18 USC § 3553(a)(6).

The other overriding goal of the Sentencing Reform Act was development of a *cohesive* sentencing system. The Act, "a comprehensive statement of the Federal law of sentencing," [S. Rep 98-225, *supra*, at 50], requires that sentences reflect the relative gravity of the offense, [28 USC § 3553(a)(2)(A)], and established a "grading scheme by which each offense can be ranked according to its relative seriousness." S. Rep. 98-225 at 51; 18 USC § 3581(b).[27]

The Commission is required to adhere to the principle of cohesiveness in fashioning sentencing policy. 28 USC § 991(b)(1)(A). Congress contemplated that guidelines promulgated by the Commission would possess such an internal logic. S. Rep 98-225 at 168. From the outset, the Commission used empirical studies to develop "a coherent sentencing system," [USSG ch. 1 pt. A § 3

Criminology 883 (1990); Stith and Koh, *Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines* 28 Wake For. L.Rev. 223 (1993).

[26] *I.e.*, a so-called "just deserts" approach which bases punishment on blameworthiness. [*See*, Breyer, *The Federal Sentencing Guidelines and the Key Compromises on Which They Rest* 17 Hofstra L.R. 1, 15-16 (1989); Nagel, n. 21, *ante.*, at 898-899].

[27] Cohesiveness in sentencing policy is an abiding concern of Congress, which reiterated the goal as recently as last year. *See*, H.R. Rep. 103-711 at 388-389, 391, 392 (1994).

¶ 11, § 5 ¶ 1; *see*, Breyer, *Compromises, supra*, 17 Hofstra L.R. at 16-18], which reduced "the hundreds of overlapping and duplicative statutory provisions" into "guidelines that are descriptive of generic conduct." *Id.* at § 4(a) ¶ 3. The drug penalties in the Guidelines reflect this philosophy; "the base offense levels in § 2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, *and apply to all unlawful trafficking.*" USSG § 2D1.1 Commentary: Background ¶ 2 (emph. added). Moreover, guideline sentence ranges correlate with the statutory minimum provisions, *i.e.*, ten grams of LSD mixture trigger both a ten year statutory minimum and a ten year guidelines sentence. Amendment 488 changed the method of calculating ten grams, but this coordination remains *un*changed in the amended Guideline.

Congress no doubt believed that coherence and proportionality could best be achieved by settling minute or technical sentencing questions at the *Commission* level rather than on a non-uniform, case-by-case basis in the Courts. Amendment 488 aimed at doing just that. The amendment was explicitly aimed at reducing sentencing disparity not only amongst dealers trafficking in identical quantities but different weights of LSD, but between LSD and other drugs. USSG § 2D2.1D Commentary: Background ¶ 7. To restore proportion and coherence to the sentencing array, the Commission assigned a fixed weight to the carrier medium and thereby calibrated LSD sentences to be slightly less severe than those for trafficking in phencyclidine (PCP), "a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD." *Id.* at ¶ 8. The result "harmonize[d] offense levels for LSD offenses

with those for other controlled substances and avoid[e]d an undue influence of varied carrier weight on the applicable offense level." *Id.*

Ironically, what was intended as a means of insuring proportionality has become, by virtue of the refusal of courts to export the calculation method of the amendment to the statute, an exemplar of unwarranted disparity. Almost *all* LSD sentences are crammed into the procrustean bed of the mandatory penalty statute rather than graduated in accordance with the guidelines. Dealers with just over a thousand doses of LSD[28] receive the same penalty as those with twenty five thousand doses. By contrast, traffickers in PCP, the very drug the Commission said was worse than LSD, continue to receive graduated and lesser sentences. More: dealers who sell their LSD before they are caught have no paper to weigh and therefore are given "pure" guidelines sentences; this "reward" to those who insert their LSD into the stream of commerce is a wicked perversion of Congress' "market oriented" penalty structure.

The "dual weight" scheme is inimical to the intent of Congress, which "sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." USSG ch. 1 pt. A § 3 ¶ 2. "While a very simple system may produce uniformity, it cannot satisfy the requirement of proportionality . . . . [T]he Commission ostensibly could have achieved perfect uniformity by specifying that

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[28] For example, 1175 doses of the LSD distributed in *United States v. Healey*, 729 F.Supp. 140, 141 (D.C. Cir., 1990) would have weighed 10 grams triggering a mandatory minimum of ten years, [*see, Chapman, supra*, 500 U.S. at 458, fn. 2].

every offender was to be sentenced to two years imprisonment." USSC *Supp. Rept. on Initial Sent. Guidelines and Policy Statements* ch. 3, § A, ¶ 2 (June, 1987). Yet sham uniformity, the very *opposite* of what Congress intended, is the inevitable result of vestigial gross-weight sentencing in LSD cases.

It is not the Commission's *amendment* which creates the disparity, but gross-weight sentencing. This was acknowledged even at the time of *Chapman, supra,* 500 U.S. at 458. When *Chapman* was decided, however, the Commission had not yet recognized or attempted to *correct* the disparity. Now that the Commission has done so, it is appropriate for the Court to complete the Commission's work.

(C) The Commission Has Persuasive Expertise On Technical Questions Such As the Meaning of LSD "Mixture"

Had the Commission spoken prior to *Chapman*, this Court likely would have listened carefully. Indeed, this Court looked to the Commission for guidance before deciding *Chapman*. *Id.* at 462.

This is entirely in keeping with the esteem with which the judiciary properly regards administrative agencies. Such agencies bring the "cumulative expertise", [*Fahey v. Mallonee*, 332 U.S. 245, 250 (1947)], to their areas of endeavor. The Sentencing Commission is particularly deserving of high regard. Congress intended that, in light of its "extraordinary powers and responsibilities", the Commission would possess "the highest quality of membership," [S. Rep. 98-225, *supra,* at 160], and Congress equipped the Commission with impressive investigative and analytical resources. 28 USC §§ 995(a)(8), (9), (10),

(12), (15), (16), (20), (21), (22). Moreover, Commission rulemaking, such as preceded promulgation of amendment 488, is preceded by plenary notice-and-comment. 28 USC § 994(x).

This Court has a long-settled policy of deferring to reasonable agency interpretations of "gaps" in statutory schemes administered by them. *Stinson v. United States, supra,* 113 S.Ct. at 1918, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-843 (1984). Invocation of the *Chevron* doctrine is not without difficulty in the instant case because § 841(b)(1) is a *criminal* statute administered not by the Commission but by the Courts. *See, Crandon v. United States, supra,* 494 U.S. at 177 (1990) (Scalia, J., concurring), but *see, United States v. Shabazz, supra,* 933 F.2d at 1035. On the other hand, the Commission is "located" in the judiciary, [28 USC § 991(a)], and "the role of the Commission in promulgating guidelines for the exercise of that judicial function bears considerable similarity to the role of this Court in establishing rules of procedure." *Mistretta v. United States, supra,* 488 U.S. at 391. Further, Commission guidelines are statutorily afforded not merely deferential, but *obedient*, reception in the courts.

However, even if *Chevron* is not technically apposite to the instant and unique question, there is no obstacle to prevent this Court from deferring *voluntarily* to the Commission's "wise solution" to the LSD sentencing problem. The Courts of Appeals have done so. *E.g., United States v. Hill,* 48 F.3d 228, 231 (7th Cir., 1995) (Posner, J.) (nonbinding Commission policy statements are "entitled to great weight because the Sentencing Commission is the expert body on federal sentencing."); *United States v. Sparks,* 19

F.3d 1099, 1101 (6th Cir., 1994) (same). Even if the Guidelines cannot break out of the confines of the penalty statute or *Chapman*, the statutory mandate of the Commission is not limited to promulgating guidelines; its core mission is to develop "sentencing policies and practices" implementing the goals of 18 USC § 3553(a)(2) and assuring fairness and proportionality. 28 USC § 991(b)(1) This Court has every reason to listen closely when the Commission speaks, through its guidelines, on such issues.

Petitioner is unaware of any authority suggesting that the foregoing analysis should not apply when, as here, Commission rulemaking responds to a decision by this Court rather than anticipating it. Indeed, Congress *intended* that the Commission act in this fashion. *Stinson, supra,* 113 S.Ct. at 1919; *Braxton, supra,* 500 U.S. at 348. While *stare decisis* can, of course, overcome agency rulemaking, the doctrine has traditionally been reserved to overturn agency arrogance which flies in the face of longstanding judicial interpretations which limit the scope of agency authority and which have been ratified by Congress. *E.g., Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 132-136 (1990); *California v. F.E.R.C.* 496 U.S. 490, 497-500 (1990). Here, by contrast, the Commission acted in immediate response to judicial rulings construing a statutory phrase which Congress had not explicitly defined. Tellingly, moreover, Congress approved of the Commission's amendment. *See,* § I(C) *ante.*

(D) This Court Should Modify *Chapman* In Light Of The Commission's Expertise

Although reassessment of *Chapman* in light of amendment 488 may lead to modification of that decision, the

modification is a modest one. Still intact will be a core principle in *Chapman*: that courts must give meaning and effect to every word in a statute passed by the legislature in a democracy; LSD punishments will still be based on the weights of LSD "mixtures". Also surviving intact will be the "market oriented" policy underlying 21 USC § 841(b)(1); indeed, Congress' "market" approach will be *furthered*.

Finally, reassessment of *Chapman* will enable this Court to implement the provisions *and the spirit* of the Sentencing Reform Act and the remarkable Commission created under it. When Congress created the Commission, it intended to rationalize sentencing policy under the governance of a single expert agency. One apparent goal was to conserve judicial resources so that every technical question did not provide grounds for litigation and appeal. Here, the Commission solved a technical problem and rationalized LSD sentencing in harmony with all of the relevant statutes. Sound judgments by the Commission should be embraced by the judiciary. Cf., *Stinson v. United States, supra,* 113 S.Ct. 1913. This Court should follow the Commission's lead and reconsider *Chapman*.

III

AMENDMENT 488 IS CONSISTENT WITH *CHAPMAN*, AND THUS APPLIES TO WEIGHT-CALCULATIONS UNDER THE MANDATORY MINIMUM STATUTE

"Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest."

Braxton v. United States, supra, 500 U.S. at 348. The Commission fulfilled this mission with a new guideline which is both responsive to and consistent with *Chapman*.

(A) Amendment 488 Merely Defines "Blotter Paper Customarily Used to Distribute LSD"

In *Chapman, supra,* 500 U.S. at 461, this Court held that "the blotter paper used in this case, *and blotter paper customarily used to distribute LSD,* is a 'mixture or substance containing a detectable amount of LSD'." The phrase "customarily used" is essential to the *Chapman* holding and marks its outer boundaries. Basing minimum sentence eligibility on the weight of *unusual* blotter paper, *i.e.,* paper which is unusually heavy or only a small fraction of which is saturated with LSD, poses intolerable risks. For this reason, this Court exempted "hypothetical cases . . . involving very heavy carriers and very little LSD", [*Id.,* at 466], and carriers "clearly not mixed or otherwise combined with the drug," [*Id.,* at 463], from its holding. In this way, due process problems are avoided. *Id.* at 466.

Just what constitutes a "standard carrier", *i.e.,* "blotter paper customarily used to distribute LSD", was not defined in *Chapman*. A precise definition remained elusive because "the weights of LSD carrier media vary widely." USSG 2D1.1(c) Commentary: *Background* ¶ 7; *Chapman, supra,* 500 U.S. at 458, fn. 2, [different paper weights cause blotter papers sentences to vary]. These factors also make actual sentences in LSD cases disparate from one another and from sentences imposed for other drugs, which was the rationale for promulgation of amendment 488.

The "definitional gap" created by *Chapman* applied to *both* the statute *and* the Guidelines. As indicated in § I(A), *ante,* this was a "gap" the Commission has unquestioned power to fill. After notice to, and comment from, the public and interested agencies, the Commission normalized calculation of the weight of blotter paper customarily used to market in LSD by way of amendment 488. Nothing in either 21 USC § 841(b) or *Chapman* is inconsistent with the Commission's new definition, and courts *must* defer to it. *See, Chevron, supra,* 467 U.S. 837. Far from being inconsistent with *Chapman,* therefore, the Commission's amendment *implements* its rule, and therefore should be applied to the statute.

(B) Consistent With *Chapman,* Amendment 488 Defines How Much of a Piece of Typical Blotter Paper Constitutes a "Mixture"

21 USC 841(b)(1) predicates sentences for trafficking in specified street drugs on the quantity of the drug *mixture* involved in the trafficking scheme.

In *Chapman, supra,* 500 U.S. at 462, this Court explained that blotter paper and LSD form a "mixture" because "[a]fter the solvent evaporates, the LSD is left behind in a form that can be said to 'mix' with the paper. The LSD crystals are inside of the paper, so that they are commingled with it, but the LSD does not chemically combine with the paper. Thus, it retains a separate existence and can be released by dropping the paper into a liquid or by swallowing the paper itself. The LSD is diffused among the fibers of the paper." By contrast, it is "nonsense" to describe LSD in glass or metal containers as a "mixture" because "[t]he drug is clearly not mixed

. . . nor . . . chemically bonded" with such containers. *Id.* at 462-463.

This means that not every *entire* piece of blotter paper containing LSD is a "mixture". "For example, if a drop of LSD were deposited onto one corner of a sheet of paper, the opposite corner would not contain any particles of the pure drug, so would not be part of the 'mixture'." *Stoneking, supra,* 60 F.3d at 407 (Beam J., dissenting). Whatever isolated portions of *Chapman* might loosely be read to say otherwise, [e.g., *Id.* at 468], such *could not* be the law, since the statute permits weighing only the *mixture.* At most, *Chapman* means that gross weight of the blotter paper is a rational *proxy* for the weight of the LSD "mixture". However, *Chapman* was decided against a background of silence by the Commission which has now advanced a "third option: . . . an assigned rational weight for the calculation of sentences." *United States v. Muschik, supra,* 49 F.3d at 516; *Stoneking, supra,* 60 F.3d at 407 (Beam, J., dissenting). "[T]he assignment of a uniform rational weight to LSD on a carrier[29] does not conflict with *Chapman.*" *Muschik, supra,* 49 F.3d at 516; *Neal, supra,* 46 F.3d at 1416 (Ripple, J., dissenting). "*Chapman* is simply neutral as to this question." *United States v. Kinder, supra,* 95 US App. LEXIS 22592 at 28 (Leval, J., dissenting (1995)). Further, as previously indicated, *Chapman,* 500 U.S. at 458 was decided in deference to Congress' "market-oriented approach" to street-drug sentencing, and

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[29] Whether this is seen as assignment of a fixed weight of .35 grams to the *paper* and a "real" weight of .05 grams to the LSD, (R. 81:3 ¶¶ 2-3), or a net of .4 mg. to the entirety has no impact on this argument.

amendment 488 accommodates, even furthers, this approach. *Muschik, supra,* 49 F.3d at 516.

Again, amendment 488 has been shown to implement rather than conflict with *Chapman*'s holding as to the meaning of "mixture or substance" in 21 USC § 841(b). The judgment should be reversed to permit Neal to be resentenced in accordance with the amended guideline.

Conclusion

In promulgating amendment 488, the Sentencing Commission did precisely what Congress intended it to do. Using its expertise, the Commission made a modest change in the "sentencing practice" associated with a technical term. By so doing, the Commission realigned LSD sentences with both the 1986 penalty statute *and* the Sentencing Reform Act. No *court* could have accomplished this, since courts are necessarily confined to the parameters of the controversies before them (as was this Court in *Chapman*). Nor is it likely that *Congress* could study and resolve a thorny technical problem too small and intricate to merit full scale legislative attention, yet too big and unjust to be ignored. This is *why* Congress created the Commission: to resolve just the sort of technical problem which prompted the Commission to act and which still remains unresolved pending resolution by this Court. Unless the Commission is sustained in performing its task, the Federal penal and judicial systems will choke on sentencing minutia; for example, this is the second time that LSD sentencing has been before this Court.

This nation needs the Sentencing Commission to do what it did here, the Courts should encourage the Commission in doing so. This Court should sustain the Commission's rule. Amendment 488 should be applied to the penalty statute. The judgment below should be reversed.

September 20, 1995

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APPENDIX A

21 U.S.C. § 841

* * *

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of

twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP)or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that

authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include supervised release of at least 4 years in addition to such a term of imprisonment and shall, if to such a prior conviction, include a term of such release of at least 8 years in addition to such imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

* * *

APPENDIX B

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * *

APPENDIX C

28 U.S.C. § 991. United States Sentencing Commission; establishment and purposes

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney General's designee, shall be an ex officio, nonvoting member of the Commission. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to –

(1) establish sentencing policies and practices for the Federal criminal justice system that –

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

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28 U.S.C. § 992. Terms of office; compensation

(a) The voting members of the United States Sentencing Commission shall be appointed for six-year terms, except that the initial terms of the first members of the Commission shall be staggered so that –

(1) two members, including the Chair, serve terms of six years;

(2) three members serve terms of four years; and

(3) two members serve terms of two years.

(b)(1) Subject to paragraph (2) –

(A) no voting member of the Commission may serve more than two full terms; and

(B) a voting member appointed to fill a vacancy that occurs before the expiration of the term for which a predecessor was appointed shall be appointed only for the remainder of such term.

(2) A voting member of the Commission whose term has expired may continue to serve until the earlier of –

(A) the date on which a successor has taken office; or

(B) the date on which the Congress adjourns sine die to end the session of Congress that commences after the date on which the member's term expired.

(c) The Chair and Vice Chairs of the Commission shall hold full-time positions and shall be compensated during their terms of office at the annual rate at which judges of the United States courts of appeals are compensated. The voting members of the Commission, other than the Chair and Vice Chair, shall hold full-time positions until the end of the first six years after the sentencing guidelines go into effect pursuant to section 235(a)(1)(B)(ii) of the Sentencing Reform Act of 1984, and shall be compensated at the annual rate at which judges of the United States courts of appeals are compensated. Thereafter, the voting members of the Commission, other than the Chair and Vice Chairs, shall hold part-time

positions and shall be paid at the daily rate at which judges of the United States courts of appeals are compensated. A Federal judge may serve as a member of the Commission without resigning the judge's appointment as a Federal judge.

(d) Sections 44(c) and 134(b) of this title (relating to the residence of judges) do not apply to any judge holding a full-time position on the Commission under subsection (c) of this section.

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28 U.S.C. § 993. Powers and duties of Chair

The Chair shall –

(a) call and preside at meetings of the Commission, which shall be held for at least two weeks in each quarter after the members of the Commission hold part-time positions; and

(b) direct –

(1) the preparation of a requests for appropriations for the Commission; and

(2) the use of funds made available to the Commission.

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28 U.S.C. § 994. Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System –

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including –

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of –

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(c)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(c)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the terms or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection(a)(1), shall for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the

range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents[1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance –

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

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[1] So in original. Probably should be "incidence".

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents[1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance –

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

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[1] So in original. Probably should be "incidence".

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity

of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and –

(1) has been convicted of a felony that is –

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.) and

(2) has previously been convicted of two or more prior felonies, each of which is –

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant –

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect –

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of –

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense.

This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of Title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication

would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including –

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the

least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in –

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commissions of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w) The appropriate judge of officer shall submit to the Commission in connection with each sentence imposed (other than a sentence imposed for a petty offense, as defined in title 18, for which there is no applicable sentencing guideline) a written report of the sentence, the offense for which it is imposed, the age, race, and sex of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendations for legislation that the Commission concludes is warranted by that analysis.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

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28 U.S.C. § 995. Powers of the Commission

(a) The Commission, by vote of a majority of the members present and voting, shall have the power to –

(1) establish general policies and promulgate such rules and regulations for the Commission as are necessary to carry out the purposes of this chapter;

(2) appoint and fix the salary and duties of the Staff Director of the Sentencing Commission, who shall serve at the discretion of the Commission and who shall be compensated at a rate not to exceed the highest rate now or hereafter prescribed for Level 6 of the Senior Executive Service Schedule (5 U.S.C. 5382);

(3) deny, revise, or ratify any request for regular, supplemental, or deficiency appropriations prior to any submission of such request to the Office of Management and Budget by the Chair;

(4) procure for the Commission temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code;

(5) utilize, with their consent, the services, equipment, personnel, information, and facilities of

other Federal, State, local, and private agencies and instrumentalities with or without reimbursement therefor:

(6) without regard to 31 U.S.C. 3324, enter into and perform such contracts, leases, cooperative agreements, and other transactions as may be necessary in the conduct of the functions of the Commission, with any public agency, or with any person, firm, association, corporation, educational institution, or nonprofit organization;

(7) accept and employ, in carrying out the provisions of this title, voluntary and uncompensated services, notwithstanding the provisions of 31 U.S.C. 1342, however, individuals providing such services shall not be considered Federal employees except for purposes of chapter 81 of title 5, United States Code, with respect to job-incurred disability and title 28, United States Code, with respect to tort claims;

(8) request such information, data, and reports from any Federal agency or judicial officer as the Commission may from time to time require and as may be produced consistent with other law;

(9) monitor the performance of probation officers with regard to sentencing recommendations, including application of the Sentencing Commission guidelines and policy statements;

(10) issue instructions to probation officers concerning the application of Commission guidelines and policy statements;

(11) arrange with the head of any other Federal agency for the performance by such agency of any function of the Commission, with or without reimbursement;

(12) establish a research and development program within the Commission for the purpose of –

(A) serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices; and

(B) assisting and serving in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices;

(13) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process;

(14) publish data concerning the sentencing process;

(15) collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States Code;

(16) collect systematically and disseminate information regarding effectiveness of sentences imposed;

(17) devise and conduct, in various geographical locations, seminars and workshops providing continuing studies for persons engaged in the sentencing field;

(18) devise and conduct periodic training programs of instructions in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process;

(19) study the feasibility of developing guidelines for the disposition of juvenile delinquents;

(20) make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy;

(21) hold hearings and call witnesses that might assist the Commission in the exercise of its powers or duties;

(22) perform such other functions as are required to permit Federal courts to meet their responsibilities under section 3553(a) of title 18, United States Code, and to permit others involved in the Federal criminal justice system to meet their related responsibilities;

(23) retain private attorneys to provide legal advice to the Commission in the conduct of its work, or to appear for or represent the Commission in any case in which the Commission is authorized by law to represent itself, or in which the Commission is representing itself with the consent of the Department of Justice; and the Commission may in its discretion pay reasonable attorney's fees to private attorneys employed by it out of its appropriated funds. When serving as officers or employees of the United States, such private attorneys shall be considered special government employees as defined in section 202(a) of title 18; and

(24) grant incentive awards to its employees pursuant to chapter 45 of title 5, United States Code.

(b) The Commission shall have such other powers and duties and shall perform such other functions as may

be necessary to carry out the purposes of this chapter, and may delegate to any member or designated person such powers as may be appropriate other than the power to establish general policy statements and guidelines pursuant to section 994(a)(1) and (2), the issuance of general policies and promulgation of rules and regulations pursuant to subsection (a)(1) of this section, and the decisions as to the factors to be considered in establishment of categories of offenses and offenders pursuant to section 994(b). The Commission shall, with respect to its activities under subsections (a)(9), (a)(10), (a)(11), (a)(12), (a)(13), (a)(14), (a)(15), (a)(16), (a)(17), and (a)(18), to the extent practicable, utilize existing resources of the Administrative Office of the United States Courts and the Federal Judicial Center for the purpose of avoiding unnecessary duplication.

(c) Upon the request of the Commission, each Federal agency is authorized and directed to make its services, equipment, personnel, facilities, and information available to the greatest practicable extent to the Commission in the execution of its functions.

(d) A simple majority of the membership then serving shall constitute a quorum for the conduct of business. Other than for the promulgation of guidelines and policy statements pursuant to section 994, the Commission may exercise its powers and fulfill its duties by the vote of a simple majority of the members present.

(e) Except as otherwise provided by law, the Commission shall maintain and make available for public inspection a record of the final vote of each member on any action taken by it.

APPENDIX D

United States Sentencing Guidelines section 2D1.1(c) sets out a weight-based table of sentences for violations of 21 USC § 841(b)(1)(A), (B), and further provides as follows:

"In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg. of LSD for the purposes of the Drug Quantity Table."

Commentary: Application Note 18 to § 2D1.1 provides:

"LSD on a blotter paper carrier medium typically is marked so that the number of doses ("hit") per sheet can readily be determined. When this is not the case, it is to be presumed that each 1/4 inch by 1/4 inch section of the blotter paper is equal to one dose.

"In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, and [sic] upward departure may be warranted."

The relevant portion of the *Commentary: Background* to § 2D1.1(c) provides as follows:

* * *

Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier

weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (b) the decision in Chapman v. United States, 111 S. Ct. 1919 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of "mixture or substance" for the

purpose of applying any mandatory minimum sentence (see Chapman; §5G1.1(b)).

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QUESTION PRESENTED

Whether the weight assigned to a dosage unit of LSD by the Sentencing Commission to calculate a defendant's offense level under the Sentencing Guidelines also governs the determination of the weight of the "mixture or substance" containing LSD under the mandatory minimum sentencing provisions of 21 U.S.C. 841(b).

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-9088

MEIRL GILBERT NEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 35-63) is reported at 46 F.3d 1405. The order of the district court reducing petitioner's sentence (J.A. 31-34) is reported at 846 F. Supp. 1362.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1995. The petition for a writ of certiorari was filed on May 2, 1995, and was granted on June 19, 1995 (J.A. 64). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND SENTENCING GUIDELINE INVOLVED

The pertinent text of 21 U.S.C. 841(b) is set forth in Appendix A to petitioner's brief (Pet. Br. App. 1-5). The pertinent parts of Sentencing Guidelines § 2D1.1(c) and of the Sentencing Commission's commentary thereto are set forth in Appendix D to petitioner's brief (Pet. Br. App. 29-31).

STATEMENT

Following a guilty plea in the United States District Court for the Central District of Illinois, petitioner was convicted on one count of possession of lysergic acid diethylamide (LSD) with intent to distribute it, in violation of 21 U.S.C. 841, and one count of conspiracy to possess LSD with intent to distribute it, in violation of 21 U.S.C. 846. He was originally sentenced to 192 months' imprisonment, to be followed by five years' supervised release. J.A. 11, 13-14. Following an amendment to the Sentencing Guidelines relating to LSD offenses, petitioner moved for a reduction in his sentence, pursuant to 18 U.S.C. 3582(c)(2). J.A. 18-23. The district court reduced petitioner's sentence to 120 months' imprisonment, the mandatory minimum term required by 21 U.S.C. 841(b)(1)(A)(v), but declined to reduce the sentence further. J.A. 31-34. The en banc court of appeals affirmed, with three judges dissenting. J.A. 35-63.

1. In the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, Congress established mandatory minimum sentences for offenses involving trafficking in controlled substances, including LSD. See 21 U.S.C. 841(b). A first offender who distributes one gram or more of a "mixture or substance containing a detectable amount of" LSD must be sentenced to at least five years' imprisonment and may be imprisoned for up to 40 years. 21 U.S.C. 841(b)(1)(B)(v). A first offender who distributes ten or more grams of a "mixture or substance" containing LSD must receive a sentence of at least ten years' imprisonment and may be confined for life. 21 U.S.C. 841(b)(1)(A)(v).[1] A first offender who distributes less than one gram of a "mixture or substance" containing LSD is not subject to a statutory mandatory minimum term, but he may be imprisoned, by statute, for up to 20 years (see 21 U.S.C. 841(b)(1)(C)), and he must be sentenced pursuant to the Sentencing Guidelines.

The mandatory minimum sentences in the Anti-Drug Abuse Act generally turn, not on the weight of the pure drug involved in the offense, but rather on the weight of a "mixture or substance" containing the illegal drug. In that respect, the Anti-Drug Abuse Act was a significant departure from previous law.[2]

---

[1] The minimum sentences are doubled if the defendant has a prior conviction for a felony drug offense. 21 U.S.C. 841(b)(1)(A) (flush paragraph) and (B) (flush paragraph). If death or serious bodily harm results from use of the LSD, a first offender who distributes one gram or more of a mixture or substance containing LSD must be sentenced to at least 20 years' imprisonment and fined severely, and a repeat offender who distributes one gram or more of an LSD mixture or substance must be confined for life. *Ibid.*

[2] The Controlled Substances Act, enacted in 1970, established penalties for the distribution of controlled substances according to the kind of drug involved, not its weight. The distribution of schedule I or II controlled substances carried a heavier punishment than the distribution of other drugs. See Pub. L. No. 91-513, Tit. II, § 401, 84 Stat. 1260-1262 (1970). The Controlled Substances Penalties Amendments Act of 1984, enacted as part of the Comprehensive Crime Control Act of 1984, introduced the principle that the sentence should vary

Congress's reliance on the weight of the "mixture or substance" reflects a "market-oriented" approach to punishing drug traffickers, under which sentences are based on the actual material distributed or intended to be distributed. See H.R. Rep. No. 845, 99th Cong., 2d Sess. Pt. 1, at 11-12, 17 (1986). Congress graduated the penalties according to the weight of the drugs in the form in which they are found—cut or uncut, pure or impure, ready for wholesaling or ready for distribution at the retail level.[3]

2. In 1987, after the enactment of the Anti-Drug Abuse Act, the United States Sentencing Commission (Commission) adopted Sentencing Guidelines to address trafficking in controlled substances. United States Sentencing Comm'n, *Sentencing Guidelines and Policy Statements* § 2D1.1 (Apr. 13, 1987) (April 1987 Guidelines). The April 1987 Guidelines followed the statutory mandatory minimum structure in several respects. The Commission established a Drug Quantity Table to designate base offense levels that

according to the weight of the drug chargeable to the defendant. In the case of LSD, the 1984 Act imposed a maximum term of 20 years' imprisonment for the distribution of five or more grams of LSD, and a maximum term of 15 years' imprisonment for the distribution of lesser amounts of LSD. See Pub. L. No. 98-473, Tit. II, Ch. V, 98 Stat. 2068. In each case, the relevant weight was that of pure LSD. *United States* v. *McGeehan*, 824 F.2d 677, 681 (8th Cir. 1987), cert. denied, 484 U.S. 1061 (1988).

[3] There are a few exceptions to that principle. For phencyclidine, propanamide, and methamphetamine, Congress tied mandatory minimum sentences to amounts of both the pure drug and a mixture or substance containing the drug. 21 U.S.C. 841(b)(1)(A)(iv), (vi) and (viii); 21 U.S.C. 841(b)(1)(B)(iv), (vi) and (viii). See *Chapman* v. *United States*, 500 U.S. 453, 459 (1991).

depended on the quantities of drugs involved in offenses. Those base offense levels generally yielded sentencing ranges corresponding to the ones required by the Anti-Drug Abuse Act; for example, an offense involving one gram of LSD was assigned a base offense level of 26, which yielded a sentencing range of 63 to 78 months' imprisonment, just above the statutory mandatory minimum term of five years.[4] The Guidelines also provided (and continue to provide) that, if application of the Guidelines results in a sentence below the minimum sentence required by statute, the statutory minimum shall be the Guideline sentence. See *id.* § 5G1.1(b). A footnote to the Drug Quantity Table in the April 1987 Guidelines stated that, "[c]onsistent with the provisions of the Anti-Drug Abuse Act, if any mixture of [*sic*] a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity." *Id.* § 2D1.1 (Drug Quantity Table) n.*.

The Commission revised its Guidelines and commentary on a number of occasions over the following years, but, until 1993, it retained the same general approach for drug trafficking offenses. Thus, in Application Note 10 to Guidelines § 2D1.1, added October 1, 1987, the Commission noted that it had "used the sentences provided in * * * the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences." In the November 1, 1989, version of the Guidelines, the Commission provided that, "[u]nless otherwise specified, the weight of a

[4] April 1987 Guidelines § 2D1.1 (Drug Quantity Table); *id.* Ch. 5, Pt. A (Sentencing Table); see also *id.* § 2D1.1 (Commentary).

controlled substance set forth in the [drug quantity] table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." United States Sentencing Comm'n, *Guidelines Manual* § 2D1.1(c) n.* (Nov. 1, 1989) (1989 Guidelines). Application Note 1 to Guidelines § 2D1.1, added November 1, 1989, reiterated that "'[m]ixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841." See 1989 Guidelines App. C, Amend. 123.

3. In several prosecutions following the enactment of the statutory mandatory sentencing provisions, federal courts considered the proper treatment of LSD distributed on a carrier medium for purposes of those provisions. Because LSD is a very powerful drug, it typically is not sold or ingested in its pure form, but is distributed on a carrier medium, such as blotter paper, infused with minute quantities of the drug. The person using the LSD for its hallucinogenic effect can swallow the entire piece of blotter paper, lick the LSD from the paper, or drop the paper into a liquid. See *Chapman* v. *United States*, 500 U.S. 453, 457 (1991). As a rule, the weight of the carrier medium greatly exceeds the weight of the pure LSD that it contains.[5] Defendants charged with LSD offenses argued that only the weight of the pure LSD, and not the weight of the carrier medium, should be included when courts calculated the weight

[5] For example, the Drug Enforcement Administration estimates that the weight of the pure LSD contained in an average dose is 0.05 milligram (see Guidelines § 2D1.1, Commentary (Background) (Nov. 1, 1994)), while the weight of the average dose of LSD on blotter paper (by far the most popular carrier) is 8 milligrams. United States Sentencing Comm'n, *Guidelines Manual* App. C, Amend. 488 (Nov. 1, 1994).

of the "mixture or substance containing a detectable amount of" LSD under Section 841(b).

In *Chapman* v. *United States*, *supra*, this Court rejected that contention and ruled that courts must use the entire weight of the carrier medium and the LSD to determine whether a mandatory minimum sentence is applicable. Construing the statutory terms "mixture" and "substance" in light of their "ordinary meaning," 500 U.S. at 462, the Court concluded that the penalty turns on "the gross weight of the carrier and drug together," rather than the "net weight of the [pure] drug," *id.* at 459, and therefore held that LSD-infused blotter paper is a "mixture or substance containing a detectable amount" of LSD, *id.* at 461-463. The Court noted that, when LSD is applied to blotter paper, "[t]he LSD is diffused among the fibers of the paper * * * [and] cannot be distinguished from the blotter paper, nor easily separated from it." *Id.* at 462. Accordingly, the Court stated, "the weight of a carrier should be included as a 'mixture or substance containing a detectable amount' of LSD when determining the sentence for an LSD distributor." *Id.* at 463; see also *id.* at 455 ("We hold that it is the weight of the blotter paper containing LSD, and not the weight of the pure LSD, which determines eligibility for the minimum sentence.").

4. After *Chapman*, the Commission reconsidered its own approach to the treatment of LSD under the Guidelines. The Commission originally proposed that Guidelines sentences for LSD offenses be based on the weight of the pure LSD involved in the offense, rather than the "mixture or substance" containing LSD. See 57 Fed. Reg. 62,832, 62,853 (1992). The Commission subsequently embraced an entirely new

approach, however, when it promulgated Amendment 488 to the Guidelines, which revised Guidelines § 2D1.1(c) with respect to LSD offenses.[6]

Although the amended Guideline nominally continues to use drug weights to calculate the defendant's base offense level, the Commission abandoned its prior reliance on the *actual* weight of the entire "mixture or substance" to calculate the base offense level. Instead, the Commission adopted a system of sentencing based on the number of doses of LSD involved in offenses. To implement that new approach, the Commission assigned to each dose of LSD a *constructive* weight of 0.4 milligram. The revised Guideline provides:

> In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.

United States Sentencing Comm'n, *Guidelines Manual* § 2D1.1(c) n.* (Nov. 1, 1994).[7]

As amended, the LSD Guideline results in lower drug weights, which translate into lower Guidelines

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[6] The Sentencing Reform Act of 1984 requires that the Commission submit amendments to the Guidelines to Congress for review for at least 180 days. The amendments take effect if they are not disapproved or modified by Congress during that period. See 28 U.S.C. 994(p). The Commission transmitted Amendment 488 to Congress on April 29, 1993 (see 58 Fed. Reg. 27,148, 27,155-27,156 (1993)), and it took effect on November 1, 1993.

[7] Amendment 488 took effect on November 1, 1993. Unless otherwise specified, all further references to the Guidelines in this brief are to the November 1, 1994, edition, which incorporates other amendments not relevant to this case.

sentencing ranges. For example, the actual weight of the average dose of LSD on blotter paper, including the carrier, is 8 milligrams (see note 5, *supra*), which is 20 times the constructive weight of 0.4 milligram per dose chosen by the Commission. Thus, a first-time offender who distributed 1,000 "average" doses of LSD would, under *Chapman* and the former Guidelines, receive a sentence based on 8 grams of a "mixture or substance" containing LSD; that offender would be subject to a five-year mandatory term of imprisonment under 21 U.S.C. 841(b)(1)(B)(v) and a Guidelines sentencing range of 97 to 121 months' imprisonment (reflecting a base offense level of 30). Under the revised LSD Guideline, that offender would be chargeable with only 400 milligrams of LSD, which would yield a base offense level of 20 and a Guidelines sentencing range of 33 to 41 months' imprisonment.

The Commission also amended the background to the commentary on Section 2D1.1 to explain its view that, "[b]ecause the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of LSD (but different carrier weights)." Guidelines § 2D1.1, Commentary (Background). "Consequently," the Commission stated, "in cases involving LSD contained in a carrier medium, [we have] established a weight per dose of 0.4 milligram for purposes of determining the base offense level." *Ibid.* The Commission remarked that the figure of 0.4 milligram per dose does not represent the actual weight of either the pure LSD or the LSD

with the carrier, but was chosen as a constructive figure to represent the drug and some amount of the carrier:

> The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit of LSD of 0.05 milligram (*i.e.*, the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in *Chapman v. United States*, [500 U.S. 453] (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed).

Guidelines § 2D1.1, Commentary (Background).

The Commission also stated that its new approach "will * * * avoid an undue influence of varied carrier weight on the applicable offense level." Guidelines § 2D1.1, Commentary (Background). "Nonetheless," the Commission observed, "this approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence." *Ibid.* (citing *Chapman* and Guidelines § 5G1.1(b)).

5. In a series of transactions that took place in February and March 1988, petitioner sold LSD on blotter paper to an undercover agent of the Illinois State Police and a confidential source working with the police. Original Presentence Report (PSR) 8-13

(May 9, 1989). The narcotics sold contained 11,456 dosage units of LSD. Updated PSR 3 (Mar. 4, 1994). The total weight of the LSD sold by petitioner, including the blotter paper, was 109.51 grams. Original PSR 13.

Because the total weight of the LSD, including the blotter paper, exceeded ten grams, petitioner was subject to the ten-year mandatory minimum sentence specified in 21 U.S.C. 841(b)(1)(A)(v). Under the version of the Sentencing Guidelines in effect on the date of his sentencing (June 19, 1989), an offense involving more than 100 grams of LSD yielded a base offense level of 36. Petitioner received a reduction in his offense level of two points, to 34, for acceptance of responsibility. Original PSR 14-15. Because petitioner had prior convictions, he was in criminal history category III, and his Guidelines sentencing range was 188 to 235 months' imprisonment. *Id.* at 17-18. The district court sentenced petitioner to 192 months' imprisonment. J.A. 13.

6. On December 10, 1993, petitioner filed a motion to modify his sentence, relying on the retroactive application of the new version of the LSD Guideline.[8] He contended that the weight of the LSD, as calculated by the new version of Guidelines § 2D1.1, was only 4.28 grams,[9] and therefore he was no longer subject to the ten-year mandatory minimum sentence for offenses involving ten grams or more of LSD. J.A.

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[8] The Commission authorized retroactive application of Amendment 488. See United States Sentencing Comm'n, *Guidelines Manual* App. C, Amend. 502.

[9] As petitioner notes (Pet. Br. 4 n.4), the weight of the LSD involved in his offense, as calculated under the revised LSD Guideline, is in fact 4.58 grams. The difference does not affect the sentence calculation.

18-23. An updated version of his PSR concluded that, under the new Guidelines, his offense level was 25, which yielded a Guidelines sentencing range of 70 to 87 months' imprisonment. Updated PSR 4-5.

The district court concluded that petitioner was still subject to the ten-year mandatory minimum sentence. J.A. 31-34. The court noted that the background commentary to the amendment to Guidelines § 2D1.1 stated that the Commission did not intend to overrule this Court's decision in *Chapman* for the purpose of applying "any mandatory minimum sentence." See J.A. 33. The court thus concluded that "the mandatory minimum sentence of 120 months mandated by 21 U.S.C. § 841(b)(1)(A)(v) supersedes [petitioner's] revised guideline range of 70 to 87 months." *Ibid.* The court did, however, reduce petitioner's term of imprisonment to 120 months, since the Guidelines no longer require a sentence in excess of the mandatory minimum level. J.A. 34.

7. The court of appeals, sitting en banc, affirmed petitioner's revised sentence. J.A. 35-63. The court acknowledged that, "[u]nder the district court's interpretation of federal law, a single amount of LSD is assigned two different weights for sentencing purposes: one weight for determining the base offense level under the Guidelines and another weight for determining eligibility for the mandatory minimum sentences provided in 21 U.S.C. § 841(b)(1)(A)(v)." J.A. 41. The court nonetheless concluded that the district court's interpretation was correct, for the post-amendment commentary to Guidelines § 2D1.1 "clearly indicates that the Commission promulgated Amendment 488 in full recognition that it would create a 'dual weight' system of calculating the weight of LSD for sentencing purposes and that

where the Guidelines approach conflicted with the statutory mandatory minimum scheme, the latter would prevail." J.A. 43. Therefore, the court concluded, "[e]ven if an amendment to the Sentencing Guidelines could super[s]ede the Supreme Court's interpretation of a separate statute, [the Guidelines commentary] make[s] clear that the amendment to § 2D1.1 purported to do no such thing." J.A. 43-44. The court also remarked that *Chapman*'s authoritative construction of the term "mixture or substance" must continue to govern the application of the mandatory minimum statute because "[t]he Commission is without authority to override *Chapman*[,] * * * '[as the Sentencing Commission has] only the power to guide judicial discretion within the statutory limits.'" J.A. 44-45.

The court rejected petitioner's argument that using the Commission's new dosage weight formula to calculate the base offense level while continuing to rely on the actual weight of the drug and carrier to determine eligibility for the mandatory minimum sentence created an arbitrary distinction in violation of due process. The court concluded that the dual-weight scheme has a rational basis: "[T]hose who deal more LSD will be punished more heavily than those who deal less, and at a certain point there is a qualitative leap in the seriousness of the deed that will give rise to a sudden rather than an incremental increase." J.A. 47. The court further concluded that the rule of lenity was not applicable to this case because there is no ambiguity in the sentencing structure set up by Congress and the Sentencing Commission. J.A. 47-48.

Circuit Judge Ripple, joined by Judges Cummings and Rovner, dissented. J.A. 50-63. The dissent argued

that the amended LSD Guideline is consistent with this Court's construction of Section 841(b) in *Chapman* because it simply assigns a fixed, uniform weight to carrier media. J.A. 53. The dissent also stressed that Congress had allowed the amended Guideline to take effect without modification or delay, and "hence with congressional approval." J.A. 61. Because, in the dissent's view, "Amendment 488 remains true to the *Chapman* mandate that the weight of the carrier must be included," J.A. 62, the dissent would have held that the weight assigned to LSD by the amended version of Guidelines § 2D1.1 also governs the weight of a "mixture or substance" containing LSD for the purpose of applying the mandatory minimum statute.

SUMMARY OF ARGUMENT

I. The Sentencing Commission's revised LSD Guideline has no application to sentencing under the mandatory minimum penalty statute, 21 U.S.C. 841(b). When the Commission promulgated Amendment 488 and adopted a constructive dosage weight approach to Guidelines sentencing for LSD offenses, it did not intend that the revised Guideline be used for sentencing under Section 841(b). The Commission stated that the new constructive weight of 0.4 milligram per dose of LSD was to be used in applying the Guidelines' Drug Quantity Table, which has relevance only to Guidelines sentencing, and gave no indication that the 0.4-milligram figure should have any application outside that context. In its commentary accompanying the revised Guideline, the Commission acknowledged the controlling force of *Chapman* v. *United States*, 500 U.S. 453 (1991), which requires that, under Section 841(b), the weight of the entire mixture or

substance be used. It also confirmed that, under Guidelines § 5G1.1(b), a statutory mandatory minimum sentence trumps any Guidelines sentencing range.

II. In any event, the Commission has no authority to overrule the decision in *Chapman*. Congress has not delegated to the Commission the authority to construe terms in Section 841(b) or to alter the sentencing policy established in that statute, which requires minimum sentences to be based on the weight of the entire mixture or substance containing LSD. Even if the Commission intended the new LSD Guideline to be an interpretation of Section 841(b), that interpretation would not be entitled to any deference.

Furthermore, even if the Commission's views were generally relevant in construing Section 841(b), the new LSD Guideline still could not be given effect. First, it conflicts with this Court's definitive construction of Section 841(b) in *Chapman*. *Chapman* requires that the weight of the entire mixture or substance be taken into account; the new LSD Guideline expressly and purposely abrogates that requirement. Second, even without the construction in *Chapman*, the new Guideline could not be squared with the language of Section 841(b), for there is no room in the statute for sentences based on something other than the actual weight of the mixture or substance distributed by the defendant, such as the constructive weight adopted by the Commission.

III. Congress's failure to modify or disapprove Amendment 488 during the six months between its submission by the Commission and its effective date has no legal significance, other than to allow the Amendment to take effect for Guidelines sentencing.

Congress can alter Section 841(b), as construed in *Chapman*, only through the constitutionally specified processes of bicameralism and presentment. Its inaction on a proposed Guideline does not have the effect of a statutory amendment. Furthermore, because the Commission confined the operation of Amendment 488 to Guidelines sentencing, there was no reason for Congress to believe that it would have any effect on sentencing under Section 841(b).

ARGUMENT

THE CONSTRUCTIVE DOSAGE WEIGHT IN THE REVISED LSD SENTENCING GUIDELINE DOES NOT GOVERN THE WEIGHT OF A "MIXTURE OR SUBSTANCE" CONTAINING LSD UNDER THE MANDATORY MINIMUM SENTENCING STATUTE

In *Chapman* v. *United States*, 500 U.S. 453, 459 (1991), this Court held that, when sentencing courts calculate the weight of a "mixture or substance containing a detectable amount" of LSD under the mandatory minimum sentencing statute, 21 U.S.C. 841(b), they must use the actual, entire weight of the drug and its carrier medium. A recent amendment to the Sentencing Guidelines instructs courts to apply a constructive weight of 0.4 milligram per dose of LSD distributed on a carrier medium when calculating a defendant's base offense level under the Guidelines. The question presented in this case is whether the Sentencing Commission's new approach should also be employed to determine the applicability of a statutory mandatory minimum sentence. The court of appeals correctly concluded that the amendment of the LSD Guideline has no effect on the statutory

method of determining the weight of a "mixture or substance" containing LSD.[10]

I. THE SENTENCING COMMISSION DID NOT INTEND THAT ITS REVISED LSD GUIDELINE BE APPLIED TO THE "MIXTURE OR SUBSTANCE" CALCULATION UNDER SECTION 841(b)

Petitioner argues that the new LSD Guideline must be applied to sentencing under Section 841(b) because the Commission intended that result, because the courts owe deference to the Commission's action, and because Congress sanctioned application of the new Guideline to mandatory minimum sentencing. His argument fails at the threshold. In both the revised Guideline itself and the Background Commentary explaining that Guideline (which is entitled to deference under *Stinson* v. *United States*, 113 S. Ct. 1913 (1993)), the Commission made clear that it did

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[10] The court of appeals' conclusion is consistent with published decisions in seven other circuits. *United States* v. *Boot*, 25 F.3d 52, 55 (1st Cir. 1994); *United States* v. *Kinder*, 64 F.3d 757 (2d Cir. 1995); *United States* v. *Hanlin*, 48 F.3d 121 (3d Cir. 1995); *United States* v. *Pardue*, 36 F.3d 429, 431 (5th Cir. 1994), cert. denied, 115 S. Ct. 1969 (1995); *United States* v. *Andress*, 47 F.3d 839 (6th Cir. 1995); *United States* v. *Stoneking*, 60 F.3d 399 (8th Cir. 1995) (en banc), petition for cert. pending, No. 95-5410; *United States* v. *Mueller*, 27 F.3d 494, 496-497 (10th Cir. 1994). Two other courts of appeals have reached the same result in unpublished decisions. See *United States* v. *Thomas*, 36 F.3d 1095 (4th Cir. 1994) (Table) (No. 94-6053), petition for cert. pending, No. 94-8233; *United States* v. *Bollwage*, 47 F.3d 431 (11th Cir. 1995) (Table) (No. 94-2120), petition for cert. pending, No. 94-8475. Only the Ninth Circuit has agreed with petitioner's argument that the revised LSD Guideline now governs the statutory minimum sentencing statute. *United States* v. *Muschik*, 49 F.3d 512 (1995), petition for cert. pending, No. 95-156.

not intend that courts apply its revised Guideline to determine the applicability of a mandatory minimum sentence under Section 841(b).

The Commission has always recognized that its discretion in setting sentencing ranges is limited by maximum and minimum sentences prescribed by statutes. Guidelines § 5G1.1(a) provides that, "[w]here the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence." Conversely, Guidelines § 5G1.1(b) states that, "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." Those two Guidelines make clear that the Commission claims no authority to override any statutory sentencing directive.

In general, the Commission has coordinated the Guidelines sentencing ranges for drug offenses with the mandatory minimum sentences of the Anti-Drug Abuse Act. In the current Guidelines, as in previous versions, the Drug Quantity Table in Guidelines § 2D1.1(c) sets the base offense levels for most drug offenses at levels that correspond to the applicable statutory minimum sentences. See Guidelines § 2D1.1, Commentary (Background).[11] In addition, the

[11] For example, the Drug Quantity Table assigns a base offense level of at least 32 to offenses involving amounts of drugs that trigger a ten-year minimum sentence under 21 U.S.C. 841(b)(1)(A). That offense level yields a Guidelines sentencing range (for a first offender) of 121-151 months' imprisonment, which has "a lower limit as close to the statutory minimum as possible." Guidelines § 2D1.1, Commentary (Background).

Commission has provided that, "[u]nless otherwise specified, the weight of a controlled substance set forth in the [Drug Quantity Table] refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Guidelines § 2D1.1(c) n.*. The Commission has explained that the term "mixture or substance" for Guidelines purposes should have "the same meaning as in 21 U.S.C. § 841, except as expressly provided." Guidelines § 2D1.1, Application Note 1. Under the Commission's approach, therefore, drugs involved in an offense will usually have the same weight for Guidelines sentencing as they have for sentencing under Section 841(b).

After *Chapman* was decided, the Commission decided to take a different approach to LSD sentencing under the Guidelines than it has taken for other drug trafficking offenses. Guidelines § 2D1.1(c) n.* directs the courts to use "the entire weight of any mixture or substance" containing a controlled substance, "[u]nless otherwise specified." In Amendment 488, which revised the asterisk note to Guidelines § 2D1.1(c) as of November 1, 1993, the Commission did "otherwise specif[y]," by instructing courts not to "use the weight of the LSD/carrier medium" but rather to "treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table." Guidelines § 2D1.1(c) n.*.

Read together, the new Guideline and accompanying commentary demonstrate that the Commission intended its new dosage weight approach to be applied only to sentencing under the Guidelines. The asterisk note to Guidelines § 2D1.1(c) (which is part of the Guideline itself) instructs sentencing courts to treat each dose of LSD on a carrier medium as equal to 0.4

milligram "for the purposes of the Drug Quantity Table." Application of the Drug Quantity Table, which is arranged by weights of various drugs, determines the defendant's base offense level; that offense level, after adjustments and when considered with the defendant's criminal history, yields the defendant's Guidelines sentencing range. The Drug Quantity Table has no operation or significance outside the Guidelines, and the Commission gave no indication that the new LSD footnote to the Table should be treated as an extraordinary exception to that fact. To the contrary, the commentary to revised Guidelines § 2D1.1 reiterates that "the Commission has established a weight per dose [of LSD] of 0.4 milligram for purposes of determining *the base offense level*." Guidelines § 2D1.1, Commentary (Background) (emphasis added).[12]

The Commission also directly addressed the effect of the revised LSD Guideline on mandatory minimum sentences in its commentary to the new Guideline.

[12] The weight of 0.4 milligram assigned by the Commission to each dose of LSD is a small fraction of the actual weight of the average dose of LSD with its carrier medium. Thus, if the dosage weight approach were applied to sentencing under Section 841(b), it would dramatically raise the threshold for application of the mandatory minimum statute. Under *Chapman*, a defendant who sells 1,250 doses on blotter paper of average weight (8 milligrams) is subject to a ten-year mandatory minimum sentence under Section 841(b)(1)(A)(v). If a weight of 0.4 milligram per dose were used, however, the ten-year mandatory minimum sentence would not apply unless the defendant sold 25,000 doses of LSD. Had the Commission intended to limit the operation of Section 841(b) so dramatically, it undoubtedly would have acknowledged the intended effect of its amendment and discussed whether its actions were consistent with the statute and *Chapman*.

After expressing its view that the revision was needed to avoid sentence disparities caused by "varied carrier weight," the Commission cautioned, "[n]onetheless, this approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence (*see Chapman*; §5G1.1(b))." Guidelines § 2D1.1, Commentary (Background).[13] The meaning of that commentary is evident: The Commission recognized that courts must continue to apply *Chapman*'s directive to use the actual weight of the entire "mixture or substance" when determining the applicability of mandatory minimum sentences for LSD offenses, even while using the constructive dosage weight to calculate base offense levels that dictate Guidelines sentencing ranges.

The Commission's statement in the commentary about the intended reach of the revised Guideline is binding on the courts. Under *Stinson* v. *United States*, 113 S. Ct. at 1920, the Commission's commentary construing a particular Guideline is controlling as long as it does not "run afoul of the Constitution or

[13] The explanatory commentary accompanying Amendment 488 reiterates that point in language that even more clearly demonstrates that the Commission did not intend to disturb the construction of Section 841(b) adopted in *Chapman*. The Commission there stated, "[n]onetheless, this approach does not override the *definition* of mixture or substance for purposes of applying any mandatory minimum sentence (*see Chapman*; §5G1.1(b))." United States Sentencing Comm'n, *Guidelines Manual* App. C, Amend. 488 (emphasis added). The Commission's use of the term "definition" in place of "applicability," which is the term used in the Commentary to the Guideline, suggests that the Commission understood the construction of the statute to be fixed by this Court and not subject to revision by the Commission.

a federal statute, and is not 'plainly erroneous or inconsistent' with [the Guideline]." Petitioner does not suggest that limiting the Commission's dosage weight approach to Guidelines sentencing presents any constitutional difficulties; indeed, that limitation avoids constitutional problems involving bicameralism and presentment raised by petitioner's argument that Congress ratified the revised Guideline by failing to prevent it from taking effect. See pp. 37-38, *infra*. And the commentary does not conflict with Section 841(b), since it acknowledges the superior force of that statute over the Guideline. It is consistent also with Guidelines § 2D1.1(c) n.*, for both texts acknowledge that Amendment 488 is restricted to application of the Drug Quantity Table.

2. Petitioner contends that, in acknowledging that the dosage weight approach does not "override" the *Chapman* construction of "mixture or substance," the Commission meant only to suggest that its revision was consistent with *Chapman*. Pet. Br. 31-34. He argues that the revised Guideline reflects the Commission's recognition that the weight of the carrier medium must somehow be taken into account to give meaning to the terms "mixture or substance" for LSD offenses, and that the commentary merely confirms that recognition. That argument is incorrect.[14]

The revised LSD Guideline does retain some aspects of the "mixture or substance" requirement

[14] A panel of the Ninth Circuit and several dissenting judges in other circuits have advanced essentially the same argument. See *Muschik*, 49 F.3d at 516; J.A. 55-59, 63 (dissent to decision below); *Kinder*, 64 F.3d at 768-769 (Leval, J., dissenting); *Stoneking*, 60 F.3d at 408-409 (Beam, J., dissenting).

found in the counterpart mandatory minimum provisions of Section 841(b). Thus, the Commission did not move to a sentencing scheme based on the weight of the pure drug; rather, it adopted a constructive weight of 0.4 milligram to represent the combined weight of the drug and its carrier. That does not mean, however, that the Commission intended that its revision have any application beyond sentencing under the Guidelines. Most telling in that regard is the Commission's citation to Guidelines § 5G1.1(b) at the very end of the new background commentary. Guidelines § 5G1.1(b) confirms that, in the event of a conflict between a mandatory minimum sentencing statute and a Guidelines sentencing range (as where the entire Guidelines range is below the statutory minimum sentence), the statute prevails. See p. 18, *supra*. By citing Guidelines § 5G1.1(b) and emphasizing that, "[n]onetheless, [the revised] approach does not override" the statutory "mixture or substance" requirement, the Commission demonstrated its understanding that the requirements of the statute, as construed in *Chapman*, would prevail over any inconsistent sentencing range calculated under the Guidelines.

Petitioner suggests, however (Pet. Br. 33), that the Commission's acknowledgment of the "mixture or substance" element in Amendment 488 is best explained by reference to the simultaneously promulgated Amendment 484, in which the Commission excluded from its own definition of "mixture or substance" materials "that must be separated from the controlled substance before the controlled substance can be used." See Guidelines § 2D1.1, Application Note 1. The commentary accompanying Amendment 488, however, gave no indication that the

revision of the LSD Guideline had any relation to the separate subject with which Amendment 484 was concerned. Amendment 484 resolved an issue, for Guidelines sentencing purposes, that was arguably not treated in *Chapman*.[15] Amendment 488, however, dealt specifically with the issue presented in *Chapman* under counterpart Guidelines provisions, limited that Amendment's reach to Guidelines sentencing, and acknowledged that the *Chapman* rule remained controlling in the event of a conflict between the Guidelines and the statute.

II. THE REVISED LSD GUIDELINE CANNOT BE APPLIED AS A CONSTRUCTION OF THE MANDATORY MINIMUM SENTENCING STATUTE

A. The Sentencing Commission Does Not Have Authority To Define The Reach Of "Mixture Or Substance" In Section 841(b)

Even if the Commission had intended its dosage weight approach to LSD offenses to govern sentencing under Section 841(b), the revised Guideline nonetheless could not be given effect in that context. With respect to certain drug offenses, Congress has not given the Commission its customary discretion in

[15] In *Chapman*, the Court noted that "[i]t may be true that the weights of containers and packaging materials generally are not included in determining a sentence for drug distribution." 500 U.S. at 463. Amendment 484 addresses much more specifically the treatment of substances associated with the production or distribution of drugs, such as "the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance." United States Sentencing Comm'n, *Guidelines Manual* App. C, Amend. 484; Guidelines § 2D1.1, Application Note 1.

setting sentencing ranges. Nor has Congress delegated to the Commission the task of construing the "mixture or substance" element in the sentencing statute. Instead, Congress has set the minimum sentence itself and has placed in the statute the condition for application of that minimum sentence: the actual weight of drugs and carrier medium involved in the offense. Congress has left no room for the Commission to modify or interpret that requirement.[16]

1. As the Court noted in *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989), "Congress * * * has the power to fix the sentence for a federal crime, * * * and the scope of judicial discretion with respect to a sentence is subject to congressional control." For most federal crimes, Congress has set only a maximum penalty and has delegated to the Sentencing Commission the task of establishing the permissible range of sentences below that maximum. See generally *id.* at 364-365, 369. But for some offenses, including those subject to the Anti-Drug Abuse Act, Congress has further established federal sentencing policy by imposing mandatory minimum penalties. The Commission cannot direct courts to impose a sentence outside those statutory limits, for, as the court of appeals correctly observed, the Commission's authority includes "only the power to

[16] With respect to offenses involving less than one gram of a mixture or substance containing LSD, Congress has left the Commission its customary discretion, and the new Guideline can be applied to such offenses. See 21 U.S.C. 841(b)(1)(C); p. 3, *supra*. The new Guideline can also be applied if the sentencing court, on motion by the government, departs downward from the mandatory minimum sentence because of the defendant's substantial assistance to the prosecution. See 18 U.S.C. 3553(e).

guide judicial discretion within the statutory limits." J.A. 45; see 28 U.S.C. 994(r) (Commission may recommend to Congress that it raise or lower statutory maximum penalties). "The Sentencing Commission promulgates guidelines by virtue of an express congressional delegation of authority for rulemaking," *Stinson* v. *United States*, 113 S. Ct. at 1919, and its authority reaches only as far as Congress has extended it.

Mandatory minimum penalties specified by Congress may well diverge from the Guidelines sentencing ranges that would apply in their absence. The Commission has, in fact, criticized mandatory minimum sentencing statutes (including the Anti-Drug Abuse Act of 1986) for creating a "cliff" effect in sentencing, such that small incremental increases in the quantities of drugs involved in offenses lead to large increases in the severity of sentences. See United States Sentencing Comm'n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 30-31 (Aug. 1991) [hereinafter *Mandatory Minimum Penalties*]. But whatever the policy arguments against mandatory minimum statutes, those arguments have no relevance to the issue at hand, for it cannot be disputed that such statutes must be given controlling effect in cases in which they apply. In cases like this one, moreover, the existence of any "cliff" effect results less from any mandatory minimum statute than from the Commission's decision dramatically to lower sentences for LSD offenses. When the Commission's views about sentencing policy depart from those of Congress, it may become difficult to achieve entirely consistent sentencing, but that is a matter for Congress, not the courts, to address. Cf. *Maislin*

Industries, U.S., Inc. v. *Primary Steel, Inc.*, 497 U.S. 116, 138 (1990) (Scalia, J., concurring).

Petitioner is therefore wide of the mark when he argues (Pet. Br. 9, 25) that the Court should not interpret Section 841(b) as an "implied repeal" of the Commission's general authority to set sentencing policy. Section 841(b) is an express exception to the system of Guidelines sentencing and has long been recognized as such. See *Mandatory Minimum Penalties* 26 ("In numerous * * * respects * * * mandatory minimums are both structurally and functionally at odds with sentencing guidelines and the goals the guidelines seek to achieve."); *id.* at 28 (describing mandatory minimums in Section 841(b) as "illustrative" of sentencing approach substantially different from that pursued in the Guidelines).

2. Petitioner contends that the courts should give effect to the Commission's new LSD Guideline in sentencing under Section 841(b) because the Commission purportedly has authority to define terms in that statute. Pet. Br. 20-28. Nothing in the Anti-Drug Abuse Act, however, suggests that Congress vested the Commission with the authority to interpret or to define the statutory phrase "mixture or substance." And absent delegation of authority to an agency, sentencing statutes are construed and applied by the courts, using traditional tools of statutory construction. See, *e.g.*, *United States* v. *Granderson*, 114 S. Ct. 1259 (1994); *Deal* v. *United States*, 113 S. Ct. 1993 (1993); *Taylor* v. *United States*, 495 U.S. 575 (1990); see also *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J. concurring in the judgment) ("The law in question, a criminal statute, is not administered by any agency but by the courts."). This Court has previously described as "dubious" the argu-

ment that the Guidelines are even "relevant" to interpretation of parallel terms in criminal statutes, which, like mandatory minimum provisions, are addressed to the courts, not the Commission. *Smith* v. *United States*, 113 S. Ct. 2050, 2055 (1993); see also *United States* v. *Palacio*, 4 F.3d 150, 155 (2d Cir. 1993) ("[U]nless the Sentencing Commission is construing its own authority as an agency, its view of the substantive meaning of a criminal statute is unlikely to be entitled to any deference.") (citation omitted), cert. denied, 114 S. Ct. 1194 (1994).[17]

Petitioner notes (Pet. Br. 21-22) that the Commission necessarily makes interpretations of federal criminal statutes in the course of fashioning Guidelines, because the Commission must strive to define the conduct that each statute prohibits to set an appropriate sentencing range. But the only products of that effort that are entitled to deference are the Guidelines sentencing ranges themselves and the Commission's commentary that explains them; the Commission is not authorized to render interpretations of substantive federal criminal law. Similarly, the Commission may consider mandatory minimum statutes in developing the Guidelines, but Congress

[17] Petitioner suggests (Pet. Br. 24) that, in the legislative history of the Sentencing Reform Act of 1984, Congress contemplated a role for the Commission in administering mandatory minimum penalty laws. The discussion cited by petitioner, however, merely refers to such laws as part of existing sentencing practice and, at most, suggests that they would continue to exist even after Congress's comprehensive reform of sentencing. See S. Rep. No. 225, 98th Cong., 1st Sess. 66 (1983). The Senate Report did not suggest that the Commission was being delegated authority to construe terms in mandatory minimum statutes.

left it to the courts to interpret and enforce the mandatory minimum provisions of federal sentencing law.[18]

Petitioner suggests that *Chapman* construed a "technical term" in the penalty statute, and that the Commission may therefore have a role in redefining that term. Pet. Br. 23, 28. He also suggests that deference to the Commission's "interpretation" of that supposedly technical term is appropriate because the 0.4 milligram dosage weight is the product of the Commission's "technical expertise" regarding the portion of the carrier medium that can be said to have "mixed" with the LSD. Pet. Br. 42, 44. The *Chapman* decision, however, did not describe the phrase "mixture or substance" as technical. Rather, the Court observed that, because the words are not defined by the statute and do not have any established common law meaning, they "must be given their ordinary meaning." 500 U.S. at 462. Nor did the Commission purport to base Amendment 488 on a scientific conclusion about the actual dispersion of

[18] The primary situation in which the Commission might have occasion to "construe" mandatory minimum penalty statutes would be to coordinate Guidelines sentencing ranges with applicable statutory minimum sentences, or to acknowledge discontinuities. Nothing in that exercise suggests that the Commission would be entitled to deference in its understanding of the mandatory minimum statutes. Petitioner asserts that courts should reconcile statutory sentencing provisions with the Commission's resolution of parallel issues under the Guidelines. Pet. Br. 24 (citing, *inter alia*, *United States* v. *McFadden*, 13 F.3d 463, 467-468 (1st Cir. 1994) (Breyer, C.J., dissenting)). But unless Congress directs otherwise, the meaning of a sentencing statute does not fluctuate based on the Commission's attempts to formulate the separate Guidelines sentencing regime.

LSD crystals among carrier media. Rather, the Commission based its dosage weight approach on policy judgments, different from those of Congress codified in Section 841(b), regarding the appropriate sentences in LSD cases. See Guidelines § 2D1.1, Commentary (Background).

Although petitioner disclaims strict reliance on the familiar principles of deference to agency interpretation expounded in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), he suggests that "the Commission is *a judicial* agency and its rulemaking may therefore be binding on courts on sentencing matters." Pet. Br. 14. Congress did establish the Commission as "an independent commission in the judicial branch." 28 U.S.C. 991(a). The Commission, however, plainly "is not a court and does not exercise judicial power." *Mistretta*, 488 U.S. at 384-385; see *id.* at 393. The Commission therefore has neither the judicial power to "say what the law is" with respect to Section 841(b) nor the congressionally delegated administrative power to interpret terms in that statute.

Certain interpretations by the Sentencing Commission are entitled to deference; in particular, Commission commentary interpreting the Guidelines is entitled to the same deference as that given to an agency's interpretation of its legislative rules. See *Stinson* v. *United States*, 113 S. Ct. at 1919; see also *Williams* v. *United States*, 503 U.S. 193, 200-201 (1992) (Commission's policy statement interpreting Guideline is authoritative guide to its meaning). In addition, courts have deferred to the Commission's reasonable interpretations of language in its own organic statute, the Sentencing Reform Act. See, *e.g.*, *United States* v. *Doe*, 934 F.2d 353, 359 (D.C.

Cir.), cert. denied, 502 U.S. 896 (1991); *United States* v. *Consuegra*, 22 F.3d 788, 789 (8th Cir. 1994). But the Commission's revised LSD Guideline is not an exercise of any power delegated by the Anti-Drug Abuse Act, and it lacks any force in the interpretation or construction of that Act.

3. Petitioner relies on lower-court decisions in which, he argues, the courts have construed provisions in sentencing statutes to conform them to the Sentencing Guidelines. See Pet. Br. 22, 24, 26-27. He suggests that those cases confirm the Commission's authority "to define and construe technical terms within the drug penalty statute." *Id.* at 23. That argument cannot be sustained.

In *United States* v. *Shabazz*, 933 F.2d 1029 (D.C. Cir.), cert. denied, 502 U.S. 964 (1991), the court, per then-Judge Thomas, upheld a Sentencing Guideline providing for sentences to be based on the weight of a "mixture or substance" containing hydromorphone against a contention that the Anti-Drug Abuse Act required sentences to be based on the pure drug.[19] The court of appeals concluded that "mixture or substance" sentencing was within the Commission's

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[19] Hydromorphone is a schedule II controlled substance, and trafficking in it is made criminal by 21 U.S.C. 841(a). Trafficking in hydromorphone, however, is not subject to the mandatory minimum penalties set forth in Section 841(b)(1)(A) or (B). Nor is hydromorphone covered by the penalties in Section 841(b)(1)(D), which relate to marijuana, hashish, and schedule III, IV and V substances. By default, therefore, the penalties for hydromorphone are found in Section 841(b)(1)(C). With certain exceptions, Section 841(b)(1)(C) provides only a maximum penalty of 20 years' imprisonment for drug offenses covered by that Section, and it does not contain the "mixture or substance" language found elsewhere in Section 841(b).

discretion because, in the statute, "Congress said absolutely nothing about how the sentence imposed should be tailored to the weight of the hydromorphone involved." 933 F.2d at 1035. That conclusion is consistent with our argument here. If Congress does not require any particular sentencing treatment, then the Commission may exercise its own delegated discretion. But if Congress speaks to a particular sentencing issue, then its direction must be given controlling effect over an inconsistent Guideline.

Petitioner also relies (Pet. Br. 25-26) on a series of cases in which the courts concluded that a traditional principle of conspiracy law, limiting a defendant's liability for actions of a co-conspirator to those acts that were reasonably foreseeable consequences of the conspiracy, should be applied to the federal drug conspiracy statute, 21 U.S.C. 846. See *Pinkerton* v. *United States*, 328 U.S. 640, 647-648 (1946). In those cases, the courts observed that the Sentencing Guidelines incorporated the *Pinkerton* rule in Guidelines § 1B1.3, and that applying *Pinkerton* in prosecutions under Section 846 had the virtue of harmonizing the sentencing principles of the Guidelines and the statutes. See, *e.g.*, *United States* v. *Irvin*, 2 F.3d 72, 77-78 (4th Cir. 1993), cert. denied, 114 S. Ct. 1086 (1994); *United States* v. *Young*, 997 F.2d 1204, 1210 (7th Cir. 1993); *United States* v. *Martinez*, 987 F.2d 920, 926 (2d Cir. 1993).

The desire for such consistency, however, was not an overriding basis for the decisions in those cases; nor did the courts reach their decisions because of deference to the Commission. See *Irvin*, 2 F.3d at 77 (Guidelines rule "not controlling of our decision"); *Young*, 997 F.2d at 1210 (framing question as whether Guidelines' approach "is also applicable to cases in

which the sentence is governed not by the Guidelines but by the statutory mandate"). In each case, the court independently examined the reach of Section 846 and concluded, based on Congress's assumptions and purpose in enacting that statute, that Congress had not intended to depart from the *Pinkerton* rule. See *Irvin*, 2 F.3d at 75-77; *Young*, 997 F.2d at 1210; *Martinez*, 987 F.2d at 925. Similarly, the sentencing determination in this case calls for application of a statute, as construed by the courts. The Commission's new LSD Guideline is not relevant to that task.

B. Because The New LSD Guideline Is Inconsistent With *Chapman*, It Does Not Govern Sentences Under The Mandatory Minimum Statute

Even if the Commission did have a role to play in construing Section 841(b), such that principles of deference would normally be relevant, the new LSD Guideline nonetheless could not be applied to the mandatory minimum statute. *Stare decisis* requires that the Commission's approach be evaluated for its conformity to governing precedents construing the language of Section 841(b), including *Chapman*. Because the revised LSD Guideline is inconsistent with *Chapman*, it does not govern cases like this one.

This Court has held that, "[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 536-537 (1992); *Maislin Industries*, 497 U.S. at 131. Thus, even in the context of a statute that is administered by an agency usually entitled to defer-

ence to its construction of ambiguous terms—as was the case in both *Lechmere* and *Maislin*—this Court's definitive construction of a statutory provision controls any subsequent administrative interpretations of the statute. Agency interpretations that are inconsistent with the judicial construction cannot be given effect.

Chapman was indisputably a construction of the "clear meaning" of Section 841(b). In that case, the Court rejected the petitioners' argument that the statutory words "mixture or substance" are ambiguous. 500 U.S. at 458-459. The Court reasoned that, since "Congress clearly distinguished between the pure drug and a 'mixture or substance containing a detectable amount of' the pure drug[,] * * * under the language of the statute the weight of the mixture or substance * * * is controlling." *Id.* at 459-460. The Court therefore held that, "[s]o long as it contains a detectable amount, *the entire mixture or substance is to be weighed* when calculating the sentence." *Id.* at 459 (emphasis added). The Court also employed traditional tools of statutory construction, including reference to the ordinary meaning of the words, to arrive at the conclusion that LSD-infused blotter paper is a "mixture or substance." *Id.* at 462. The Court rejected the petitioners' reliance on the rule of lenity because, it concluded, the statute is not ambiguous, and the "straightforward reading" of the statute does not produce a result demonstrably at odds with Congress's likely intent. *Id.* at 463-464. And, although the Court was well aware that "those selling the same number of doses [c]ould be subject to widely varying sentences depending upon which carrier medium [is] used" (*id.* at 458 n.2), it held that

Congress had a rational basis for tying penalties to the weight of drugs in the form in which they are actually sold (*id.* at 465).

The new LSD Guideline is inconsistent with *Chapman*'s rule that "the entire mixture or substance" is to be weighed when calculating the sentence. The Guideline specifically directs courts *not* to use the entire weight of the entire mixture or substance: "In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper) do not use the weight of the LSD/carrier medium." Guidelines § 2D1.1(c) n.*. The binding background commentary to the Guideline explains that the Commission deliberately chose not to tie the base offense levels to the "entire weight of the LSD and carrier medium" because doing so, in the Commission's view, "would produce unwarranted disparity among offenses" involving LSD. Guidelines § 2D1.1, Commentary (Background).

Petitioner suggests, however, that the revised LSD Guideline can be viewed as simply a standard definition of the amount of a carrier medium that constitutes a "mixture." Pet. Br. 47-49.[20] There is no hint in the Guideline or the commentary, however, that the Commission viewed its amendment in that fashion. Furthermore, even if the Commission had adopted that view, the result would be inconsistent with *Chapman*. An important basis for the decision in *Chapman* was the Court's recognition that Congress had adopted a "market-oriented" approach to punishing drug trafficking, under which "the total quantity of what is distributed" determines the

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[20] As petitioner observes, the Ninth Circuit and several dissenting judges have also taken that position. *Muschik*, 49 F.3d at 516; *Stoneking*, 60 F.3d at 407 (Beam, J., dissenting).

length of the sentence. 500 U.S. at 461. Congress "intended the penalties for drug trafficking to be graduated according to the weight of the drugs in whatever form they were found." *Ibid.* There is no room in that sentencing scheme—which applies to many other drugs as well as LSD—for the operation of the Commission's system based on the constructive weight of LSD.

Indeed, the amended Guideline could not be squared with the language of Section 841(b), even if the question in *Chapman* were still open. The statute requires that the sentence be based on "a mixture or substance" containing LSD. 21 U.S.C. 841(b)(1)(A)(v). Petitioner argues that "a" mixture or substance need not be the heaviest possible mixture of drug and carrier, and that the Commission has authority to specify "the" mixture or substance to be used in calculating the weight of the LSD. Pet. Br. 38. But in Section 841(b) Congress plainly referred to any particular mixture or substance containing LSD involved in the defendant's offense and made the weight of that mixture or substance the basis for invoking the mandatory penalties. Congress did not refer to a hypothetical, average mixture or substance. One might argue—as the petitioners did in *Chapman*—that the weight of only the pure drug should be taken into account; but one cannot reasonably argue that something more than the pure drug, but less than the entire mixture or substance, should be used.

Under petitioner's approach, the meaning of the statutory language could change frequently, depending on the Commission's interpretation. Petitioner evidently is content with the Commission's current directive, based on a constructive weight of 0.4 milligram per dose of LSD. In the future, however,

the Commission might conclude that LSD offenses were not being punished severely enough and might assign a constructive weight of (for example) 1 milligram, or even 8 milligrams, to each dose of LSD. See note 5, *supra* (8 milligrams is average weight of dose of LSD carried on blotter paper). The Commission might even revert to a system based on the actual weight of the entire mixture or substance. Even if, in unusual cases, it might be difficult to determine whether a particular material is a "mixture or substance," the statutory terms are not so pliable that they can mean an actual mixture or substance, and also any constructive mixture or substance weighing any amount less than an actual mixture or substance. No accepted theory of statutory interpretation supports such a peculiar result.

III. CONGRESS DID NOT OVERRIDE *CHAPMAN* WHEN IT PERMITTED THE REVISED LSD GUIDELINE TO TAKE EFFECT

Finally, petitioner contends (Pet. Br. 10-11, 28-31) that Congress itself overrode *Chapman* and approved the application of the new LSD Guideline to Section 841(b) when it failed to modify or disapprove the Guideline before it took effect six months after the Commission transmitted it to Congress.[21] That argument fails for several reasons.

First, as discussed above (pp. 20-21, *supra*), the commentary to the amended Guideline specifically disclaims any intent to "override" the definition of "mixture or substance" established in *Chapman*, and it acknowledges the controlling force of mandatory

[21] See also *Muschik*, 49 F.3d at 517; *Stoneking*, 60 F.3d at 409 (Beam, J., dissenting).

minimum sentencing statutes. As a result, Congress had no reason to believe that Amendment 488 would affect the calculation of mandatory minimum sentences under Section 841(b), and its failure to block that Amendment cannot be viewed as congressional approval of such a change.

Second, the premise of petitioner's argument, that Congress's failure to block a Guidelines amendment could alter the meaning of Section 841(b), is inconsistent with basic constitutional principles. This Court's construction of Section 841(b) is controlling unless and until Congress amends the law. Congress cannot change the law through inaction; under Article I, Section 7, of the Constitution, a statute can be amended only if a bill is passed by both Houses of Congress and signed by the President (or if Congress validly overrides a presidential veto). *INS* v. *Chadha*, 462 U.S. 919, 951-959 (1983). This Court has also instructed on numerous occasions that Congress's failure to enact legislation is an unreliable basis for conclusions about its intent. See, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439, 1453 (1994); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 114 (1989); *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 306 (1988).

Sibbach v. *Wilson & Co.*, 312 U.S. 1 (1941), is not to the contrary. In that case, the Court sustained the validity of Rule 35 of the Federal Rules of Civil Procedure against the contention that it contravened the statutory restriction that the Rules not affect substantive rights. The Court observed that, pursuant to the Rules Enabling Act, it had submitted Rule 35 to Congress for consideration, and that the Rule had not taken effect until the expiration of a six-

month period of congressional review. 312 U.S. at 14-15. The Court noted that report-and-wait provisions are "frequently * * * employed to make sure that the action under the delegation squares with the Congressional purpose," and it concluded that "[e]vidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules." *Id.* at 15.

As a general matter, it is doubtful that any inference about Congress's intent may be drawn from its failure to overturn a rule submitted to it for review under a report-and-wait provision.[2] Even if an inference could be drawn in some cases, none that assists petitioner could be drawn here. Congress may well have satisfied itself that the revised LSD Guideline is consistent with the Commission's authority, and with Congress's own general policy principles, insofar as it concerns sentencing *under the Guidelines*. That, in turn, may have been sufficient for Congress to allow the Guideline to take effect. The revised LSD Guideline is not, however, an exercise of any power delegated by Congress to the Commission

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[2] As Justice Frankfurter, joined by Justices Black, Douglas, and Murphy, observed in *Sibbach*, 312 U.S. at 18 (dissenting opinion):

> [L]ittle significance attaches to the fact that the Rules, in accordance with the statute, remained on the tables of two Houses of Congress without evoking any objection * * * and thereby automatically came into force. Plainly the Rules are not acts of Congress and can not be treated as such. Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality.

to implement Section 841(b). Contrary to petitioner's suggestion (Pet. Br. 31), Congress's failure to block implementation of Amendment 488 does not imply its approval of the new Guideline to sentencing under Section 841(b).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MEIRL G. NEAL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

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PETITIONER'S REPLY BRIEF

Introduction

Petitioner's brief shows that the method for calculating the weight of LSD mixtures is and ought to be the same for statutory sentencing purposes as for guidelines purposes. Respondent argues that the Sentencing Commission never intended its guideline to apply to weight calculations under the statute. (Resp. Br. at 17-24) Respondent also contends the guideline *cannot* apply to the statute because this Court already construed the statute in *Chapman v. United States*, 500 U.S. 453 (1991) (Resp. Br. at 24-37), and the Commission has no further role to play in interpreting the term "mixture or substance". (Resp. Br. at 29-30) Petitioner briefly replies to these arguments.

1. The History of Amendment 488 Shows That the Commentary Did *Not* Disavow Application of Amendment 488 to the Statute, But Merely Proclaimed That the Statute and Guideline Were Consistent

Respondent contends that petitioner "fails at the threshold" (Resp. Br. at 17) because the Sentencing Commission explicitly disavowed any intent to apply amendment 488 to the penalty statute, 21 USC § 841(b). (Resp. Br. at 17-24) Respondent's assertion is inaccurate.

Respondent relies primarily on a passage in the Commission's Commentary, that its "approach does not override the applicability[1] of 'mixture or substance' for purposes of applying any mandatory minimum sentence (*see Chapman*)". (Resp. Br. at 21). A review of the historical development of amendment 488 reveals that *whatever* this passage means[2] it does *not* have the meaning attributed to it by respondent.

Amendment 488 had its genesis in a proposal by the Legislative Service of the Federal Defenders to eliminate *all* carrier weight from LSD sentences. (Resp. Br. at 7, citing 57 Fed. Reg. 62832, 62853 (1992)) The Commission did not ratify this proposal because it was inconsistent with *Chapman*, and instead fashioned a system which incorporates the weight of some of the LSD carrier and thereby conforms to the sentencing statute. As is shown in § 4, *infra*, the 0.4 mg. dose-weight in amendment 488 was the result of elaborate empirical studies by the Commission of the market in LSD and the other drugs penalized in § 841(b)(1)(A) and (B). After careful inquiry and deliberation, the Commission was able to assign a weight for doses of LSD *as they are sold in the market on a carrier*, so as to harmonize penalties in LSD cases amongst themselves and with those for other drugs. It is *this*

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[1] In Commentary accompanying the amendment, itself, the Commission used the more emphatic word "definition" in place of "applicability." (*See*, Resp. Br. at 21 n. 13)

[2] It has been described as "obscure" by at least one appellate judge. *United States v. Kinder*, 64 F.3d 757, 768 (2nd Cir. 1995) (Leval, J., dissenting).

"carrier-weight-inclusive" system – a system which punishes LSD trafficking in the format in which the drug is delivered to consumers – which "does not override 'mixture or substance' " and is consistent with the "market oriented" approach taken by Congress in framing § 841(b)(1)(A) and (B).[3] The Commission's Commentary was not intended to limit the "reach" of the amendment, but rather to *proclaim* that the amendment was consistent with the penalty statute to which the guideline correlates.[4]

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[3] As petitioner argued in his brief (Pet. Br. at 33), this analysis is fortified by the Commission's adoption, simultaneous to amendment 488, of another amendment in which the Commission deleted certain types of precursor materials from its previous definition of 'mixture' in order to square the guidelines with *Chapman*'s "market oriented" rationale. (USSC, *Manual* App. C, Amend. 484 (1994)) While respondent is correct in asserting (Resp. Br. at 24) that this amendment is not directly related to amendment 488, *both* amendments reflect a "mindset" on part of the Commission to harmonize the guidelines with the "market oriented" penalty structure of § 841(b)(1)(A) and (B) rather than to set up a dual scheme of sentencing in drug cases. (*See* Pet. Br. at 33)

[4] As such, respondent's reliance on *Stinson v. United States*, 508 U.S. ___, 113 S.Ct. 1913, 1920 (1993) (Resp. Br. at 17, 21-22) is misplaced. *Stinson* held that Commission Commentary is controlling in interpreting a guideline, *but only if not in conflict with the guideline, itself. Id.* at 1918. As indicated, the guideline was intended to establish a weight calculation method in LSD cases consistent with § 841(b), and the Commentary announces rather than qualifies this. To the degree the Commentary can be interpreted otherwise, it is inconsistent with the guideline and should not be followed.

2. The Powers of the Commission Under the Sentencing Reform Act Survived the Passage of Mandatory Penalty Provisions

Attacking a core premise of petitioner's argument, respondent states that "[n]othing in the Anti-Drug Abuse Act . . . suggests that Congress vested the Commission with the authority to interpret or define the statutory phrase 'mixture or substance'." (Resp. Br. at 27; *see also id.* at 30-31) As appears, this contention cites the wrong statute and thereupon interprets it incorrectly.

The first section of petitioner's brief (Pet. Br. at 20-35) was based on the premise that the Sentencing Commission necessarily interprets phrases in sentencing statutes so as to write sentencing guidelines based on such statutes. Textual interpretation of this sort is neither "legislation" nor a quasi-judicial exercise in "statutory construction" on part of the Commission. Rather, it is an activity implicit in, and necessary to, the Commission's "unusual hybrid . . . structure and authority". *Mistretta v. United States*, 488 U.S. 361, 412 (1989). Specifically, the Sentencing Reform Act directs the Commission to "establish sentencing policies and practices for the Federal criminal justice system" [28 USC § 991(b)(1)], by promulgating guidelines which, *inter alia*, "for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18" [28 USC § 994(b)(1)], and which determine the "appropriate length of . . . a term of imprisonment" [28 USC § 994(a)(1)(B)] by taking into account (amongst other factors) "the grade of offense" [28

USC § 994(c)(1)].[5] As explained by petitioner in his opening brief (Pet. Br. at 20-28) this task simply cannot be accomplished unless the Commission is empowered to look to and interpret penalty statutes so as to ascertain the harm at which they are directed and develop guidelines accordingly.[6] Such interpretations have the force of law because the guidelines predicated on them are *binding* on sentencing courts (Pet. Br. at 20-27; *see*, 18 USC §§ 3553(a)(4), (b),[7] and have the cachet of Congressional approval, since Congress has the power to reject proposed guidelines amendments with which it disagrees. [28 USC § 994(p)]. (Pet. Br. at 28-31). *Dozens* of appellate cases have upheld the authority of the Commission, when interpreting statutes in this manner, to "define" the drug mixtures which are subject to penalty statutes. (*See*, Pet.

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[5] Other sections of the enabling legislation reinforce the foregoing. The Commission is directed to develop new and longer terms of imprisonment for crimes which, in the Commission's opinion, are not punished seriously enough. 28 USC § 994(m). The Commission is also directed to recommend to Congress modification of maximum penalties as appropriate. 28 USC § 994(r).

[6] *See also* 28 USC § 994(c)(2),(3), and (4) [in framing guidelines, Commission is directed to look to the harms occasioned by specific offenses; factors which mitigate or aggravate the commission of specific offenses; and the community view of the gravity of specific offenses in setting penalties].

[7] Section 3553(a)(4) (*see*, Pet. Br. App. 6-7), provides that courts must consider the guidelines in imposing sentences. Section 3553(b) provides in relevant part that "[t]he court *shall* impose a sentence of the kind, and within the range, referred to in subsection (A)(4). . . . " (emph. added). *See also Stinson v. United States, supra*, 113 S.Ct. at 1917; *Burns v. United States*, 501 U.S. 129, 133 (1991).

Br. at 22-23 and fns. 12-14) Amendment 488 is but another instance of this familiar exercise of interpretive authority by the Commission.

Respondent appears to recognize the source and scope of delegation of interpretive authority to the Commission, and *concedes* that the Commission's amended definition of LSD weight applies to offenses involving less than a gram of LSD mixture and even to offenses involving *more* than a gram if the government makes a "substantial assistance" motion under 18 USC § 3553(e). (Resp. Br. at 25 n. 16) However, respondent argues that the presence of mandatory penalty provisions in 21 U.S.C. §§ 841(b)(1)(A) and (B) alters this analysis (unless the government has moved for a § 3553(e) departure). (Resp. Br. at 26-27, 31-32) This is not a logical position. The Commission is vested with interpretive powers by virtue of its *enabling legislation*, not by any specific penalty statute, and the Commission's authority is neither increased nor diminished by a defendant's assistance to the government. The rationale behind cases such as *United States v. Shabazz*, 933 F.2d 1029, 1035 (D.C. Cir.), *cert. den.*, 502 U.S. 964 (1991) (Thomas, J.) is that courts must obey the Commission because its interpretative definitions have the force of law. Nothing in mandatory penalty statutes (or § 3553(e)) alters this analysis – a fact reflected in the decisional law. For example, the Eleventh Circuit has held that the Commission is empowered to define the term "cocaine base" both for guidelines purposes *and* for calculation of eligibility for the mandatory minimum; persons trafficking in cocaine products which the Commission does not recognize as "cocaine base" are exempted from mandatory minimum sentencing under

the statute, despite prior judicial decisions defining such substances as constituting "base" cocaine. *United States v. Munoz-Realpe*, 21 F.3d 375 (11th Cir. 1994).[8] On similar reasoning, several appellate courts have recognized the Commission's authority to define the phrase "mixture or substance containing a detectable amount of LSD" for *all* sentencing purposes, including ascertainment of eligibility for the mandatory minimum in § 841(b)(1). *United States v. Muschik*, 49 F.3d 512 (9th Cir. 1995), *cert. pending*, No. 95-156[9] *see, United States v. Jordan*, 842 F.Supp. 1031 (M.D. Tenn. 1994); *cf. also United States v. Turner*, 59 F.3d 481 (4th Cir. 1995).[10]

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[8] The court described the promulgation and ultimate acceptance by Congress of the new definition of "cocaine base" as amounting to "subsequent Congressional action." *United States v. Munoz-Realpe, supra*, 21 F.3d at 377.

[9] "[A] refinement of the sentencing scheme through the action of the Commission, with the knowledge and consent of Congress, is an expected and necessary element of the process contemplated by the present sentencing scheme. . . . The Commission performed its congressionally delegated role by amending § 2D1.1 in light of *Chapman*. Congress did not challenge the amendment. We should not assume that Congress has made conflicting policy decisions regarding LSD weight in the areas of mandatory minimum and Guideline sentencing when those decisions may be so easily harmonized." *Id.* at 517.

[10] The panel of judges in *United States v. Ingram*, 1995 WL 581279 [67 F.3d 126] (6th Cir. 1995) found *Muschik*'s reasoning to be persuasive, although it was precluded by contrary circuit precedent from articulating an affirmative rule harmonizing amendment 488 with the statute; the Court thought "it would not be improper for us to suggest that this Court reconsider" its earlier decision. 1995 WL 581279 at 4.

In fact, mandatory penalty provisions and the guidelines have coexisted from the outset. To the very report on which respondent relies to illustrate the collision between the two approaches, [(Resp. Br. at 26, citing USSC *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991)], the Commission appended a list of 98 mandatory minimum provisions, a *majority* of which (56) were in existence at or before the passage of the Sentencing Reform Act which created the Commission. *Id.* at App. A. As petitioner indicated in his brief (Pet. Br. at 24), Congress intended the Commission to oversee minimum as well as "open" sentencing provisions. Petitioner is *not* "wide of the mark" (Resp. Br. at 27) in contending that the Commission retains authority to fulfill its mandate even where a mandatory sentencing provision sets the outer limits of imprisonment. "The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the mandate to apply the Guidelines is itself statutory." *United States v. R.L.C.*, 503 U.S. ___, 112 S.Ct. 1329, 1334 (1992).[11]

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[11] There are, of course, philosophical tensions between the refinements of the guidelines approach and the "tariff-like" "cliffs" imposed under mandatory minimums. *See*, USSC: "Mandatory Minimums," *supra*, at 26, 28, 30-31; USSC: "Remarks of Chief Justice William H. Rehnquist National Symposium on Drugs and Violence in America, June 18, 1993" at 9 (1993). However, it does not follow that the specific guideline at issue here is necessarily inconsistent with any penalty statute to which it relates.

Respondent tries to fortify its position with case citations (Resp. Br. at 27 ¶ 2) but only one cited case (*United States v. Granderson*, 510 U.S. ___, 114 S.Ct. 1259 (1994)) even *mentions* the Commission or its guidelines. It is odd for respondent to rely on *Granderson*, since that decision can be read as *expanding* the Commission's authority by giving it *de facto* power to *set* a mandatory penalty. The issue in *Granderson* was the length of the minimum term of imprisonment which must be imposed when probation is revoked under certain circumstances. The relevant statute provided for a minimum penalty of "one-third of the original sentence", which the Government interpreted to mean a third of the period of probation (in Granderson's case, a third of five years and thus more than his maximum "exposure" for the underlying offense). This Court held that the "original sentence" is the normal *guidelines range* for the underlying offense. Since the guidelines range is set by the Commission, this means that the mandatory minimum sentence in Granderson's case was, in effect, set by the Commission. Whatever significance *Granderson* has, it hardly stands for a limitation on the authority or prestige of the Commission.[12]

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[12] Also misplaced is respondent's reliance on *Smith v. United States*, 508 U.S. ___, 113 S.Ct. 2050, 2055 (1993) for the proposition that guidelines are never relevant in construing criminal statutes. In *Smith*, this Court rejected as "dubious . . . in the present context" an attempt by a defendant to apply an unrelated guideline to settle whether trading a gun for drugs constitutes "use" of a gun in a drug crime in violation of 18 USC § 924(c). This Court did *not* hold that guidelines predicated on actual statutes are irrelevant in construing those statutes; to the contrary, in *Chapman v. United States*, *supra*, 500 U.S. at 462, this

Repeals by implication are not favored. (Pet. Br. at 24-25) The burden would seem to be on respondent to *demonstrate* its proposition that mandatory minimum statutes effected a *de facto* repeal of core aspects of the Sentencing Reform Act. Respondent has failed in this task.

3. Amendment 488 Reflects the Congressionally-Sanctioned Interpretation of "Mixture or Substance" in LSD Cases

Petitioner argued (Pet. Br. at 28-31) that Congress' failure to utilize 28 USC § 994(p) to block amendment 488 is of significance in that it shows Congressional "approval" of the sentencing practice promulgated by the amendment.

(A) *There is No "Presentment Clause" Problem*

Respondent counters suggests that such an inference is problematic under the "presentment clause" [art. I § 7] of the Constitution. (Resp. Br. at 38, citing *I.N.S. v. Chadda*, 462 U.S. 919 (1983). However, the "presentment clause" applies only to *legislation*. Amendment 488 is not *legislation*. It is a "sentencing practice", [28 USC § 991(b)(1)], set up by the Commission pursuant to explicitly delegated authority to set up such practices. The Commission did not purport to repeal § 841(b)(1)(A) and (B). It merely modified the "sentencing practice" as to calculation of mixture weight under the statute. It did so

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Court stated that it looked to the guidelines as part of its task of construing § 841(b).

without "overriding" the statutory command that drug weights be calculated in mixed, rather than pure, form. Notwithstanding the amendment, ten grams of LSD mixture *still* fetches a ten-year sentence, and the Drug Quantity Table still correlates with § 841(b)(1)(A) and (B). There is therefore no legislation at issue in this record, and hence no "presentment" problem.

(B) *Congress Acquiesced in the Commission's Interpretation of "Mixture or Substance"*

Congress' silence is, however, *significant*. It is likely that Congress viewed the amended guideline and § 841(b)(1)(A) and (B) as harmonious approaches to the same problem using identical language. *United States v. Munoz-Realpe, supra*, 21 F.3d at 378, citing *United States v. American Building Maintenance Industries*, 422 U.S. 271, 277 (1975) [use of term in FTC Act and FTC practice controls definition of parallel term in Clayton Act]; *Oscar-Meyer, Co. v. Evans*, 441 U.S. 750, 755-756 (1979) [same: *haec verba* provisions in Civil Rights Act of 1964 and Age Discrimination in Employment Act of 1967. This analysis is particularly compelling with regard to sentencing, since the avowed purpose of the Sentencing Reform Act was creation of a coherent sentencing structure. Thus when, as here, the Commission interprets a term common to the guidelines and the statute, and "Congress itself thought the Guidelines were not inconsistent enough with its mandate . . . so as to require change," [*United States v. Leuddeke*, 908 F.2d 230, 233 (7th Cir. 1990)], it is reasonable to conclude that Congress is in accord with the Commission's interpretation of the statutory phrase. *See generally,*

Sibbach v. Wilson & Co., 312 U.S. 1, 14-15 (1941); *United States v. Munoz-Realpe, supra*, 21 F.3d at 977.

Respondent counters that Congress cannot be said to have *agreed* with the interpretation of "mixture or substance" in amendment 488, but only 'went along' with the amendment to the extent "it concerns sentencing *under the Guidelines*" (Resp. Br. at 39, emphasis in original) This cannot be correct. The guidelines *implement* sentencing statutes. The Commission lacks authority to pass a guideline which explicitly violates a statute. (*See*, Resp. Br. at 26) Nor would Congress tolerate the Commission in doing so. Using its reserved authority under 28 USC § 994(p), Congress would *block* such a guideline, as it recently did in response to the Commission's attempt to change the penalty for "crack" cocaine in a manner inconsistent with § 841. (*See* S.R. 1254, Pub. L. 104-38, 104th Cong. 1st Sess., 109 Stat. 334, 58 Cr.L. 1087, 1109 (Oct. 30, 1995)). That Congress did not do so here is evidence that Congress viewed amendment 488 as consistent with the penalty statute to which it relates.

4. The Commission *Does* Have a Role in Interpreting The Technical Phrase "Mixture or Substance Containing . . . LSD", and This Court Should Pay Heed to the Commission's Voice Because Amendment 488 Was Based on Empirical Studies of High Quality

Petitioner contends that amendment 488 was the work of an expert agency on a technical issue falling within the ambit of its expertise. Respondent counters that "mixture or substance" is not a "technical term" but rather is a phrase limited to its plain meaning as ascertained in *Chapman, supra*, 500 U.S. 453. (Resp. Br. at 29-30)

Respondent misconstrues the "technical" field over which the Sentencing Commission is expert. The Commission is not a board of pharmacists. Its expertise lies in the field of *sentencing*. It was chartered to develop a *proportionate* sentencing scheme on the basis of empirical data. This is precisely what it did with amendment 488. In fact, this Court looked to the Commission for technical guidance before deciding *Chapman* on an "ordinary meaning" basis.[13] *Id.* 500 U.S. at 462. This was entirely appropriate, since "mixture or substance" may accurately be described as a "technical" term in two ways.

First, the phrase may refer to the "technology" of drug delivery – not so much in the sense of "scientific conclusion[s] about the actual dispersion of LSD crystals among carrier media," (Resp. Br. at 29-30), as in the sense of the *social* science of the economics of drug packaging and trafficking. As petitioner pointed out in § III of his brief (Pet. Br. at 45-49), *Chapman* left at least two such technical questions unanswered in its wake.

Second, the phrase is "technical" with respect to developing *proportionate penalties for like crimes*. This is the *core* task of the Commission. 28 USC §§ 991(b)(1)(B), 994(f) Although respondent apparently feels it is not an area for "scientific" inquiry, the guidelines necessarily "begin[ ] with, and build[ ] upon, empirical data", (USSG *Manual* ch. 1 pt. A § 3 ¶ 15), in this very area.

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[13] At the time of *Chapman*, the Commission had not yet spoken to the issue. Empirical data showing disproportionate sentencing in LSD cases in the wake of *Chapman* was not, of course, available to the Commission until after *Chapman* was decided.

The Commission undertook extensive factfinding in *both* areas before promulgating amendment 488. Specifically, the Commission had before it a sentencing record from *every* Federal case, including all drug cases in general and all LSD cases in particular. 28 USC § 994(w); *Mistretta, supra,* 488 U.S. at 369-370. The Commission also had a treasury of sentencing data which it was required to collect under its statutory scheme, and which it *had* been collecting over the years. *See generally,* 28 USC §§ 995(a)(8), (9), (12), (13), (14), (15); (USSG *Manual* ch. 1 pt. A § 5). To this data base, the Commission added extensive written and oral testimony on the proposed LSD amendment. The "public comment" files of the Commission reflect considerable input from attorneys and ordinary citizens on LSD weight and its impact on sentencing.[14] This written comment was followed by a full day of testimony devoted to the merits of amendment 488 and several other proposals.

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[14] *E.g.*, Tr. USSC Hearings 3/22/1993 at 173-178 (testimony of Denise Helou incorporating study of 120 LSD offenders and sentences showing gross sentencing disparity in LSD sentences); *Id.* at 7-18, 165-170, 178-179, 180-182, 183-186 (testimony from family members); Letters from FPD office in San Francisco; Thomas Jones, Esq.; Klinger, Robinson, et al.; Richard Marshall, P.C.; McCormick & Christoph, P.C.; Karen Wilkes, Esq.; Richard Besser; William Burke; Virginia Conroy; Rachel Rose; Ernie Voegtlin; Citizens for Equal Justice (authored by the undersigned); Citizens United for Rehabilitation of Errants; and Families Against Mandatory Minimums; Geneva Christian Church. No doubt the Commission also drew on empirical knowledge about PCP penalties

After these hearings, the Commissioners deliberated for over a month before unanimously agreeing to a sentencing rule which harmonized the circumstances of numerous individual cases into a uniform and proportionate sentencing norm. Commentary accompanying amendment 488 makes it clear that the Commission derived its .4 mg per dose definition of "mixture" from extensive cross-comparison of penalties in LSD cases amongst themselves and with those for PCP or heroin, and then ranking the penalty tiers according to social harm. The formulation of a guidelines amendment based on this data was, itself, the result of empirical study. The initial proposal, "amendment 50" as published in the Federal Register, was to weigh each dose of LSD at 0.05 mg., a figure supplied by the DEA. After the hearings, the Commission substituted amendment 50(A), which contained two variant dose-weights (0.05 mg. and 0.08 mg.) derived from a DEA chart of LSD potency during the years 1986-1991, [*see* DEA, "LSD: A Situation Report" at 49 (1992)]. According to a memorandum from the Commission's counsel, the .08 figure insured a greater equivalency between *street prices* of equivalent amounts of LSD and the other street drugs listed in § 841(b)(1)(A) and (B). Meanwhile, a group of House Republicans wrote the Commission complaining that elimination of *all* carrier weight would be inconsistent with § 841(b) as interpreted in *Chapman*. (Letter of Henry Hyde, *et al.* to USSC 4/7/1993 (copy in author's files)). Finally, the Commission submitted a revised amendment 50(A), which ultimately was passed as guidelines amendment 488, which accounted for some but not all of the weight of the blotter paper and equated LSD penalties with those for PCP, and

therefore correlated with the "market" approach of § 841(b)(1)(A) and (B).

This was not a mere "policy judgment[ ], different from those of Congress codified in Section 841(b)"[15] (Resp. Br. at 30) but an empirical study of high quality – the sort of assessment which sentencing judges traditionally undertook in individual cases over the years, but which Congress has now directed be done on a uniform basis by a national Sentencing Commission promulgating normative "sentencing practices" [28 USC § 991(b)(1)] for the judiciary at large. *This* is why Congress created a Commission of judges and sentencing experts, [28 USC § 991(a)], and conferred on it plenary investigatory powers [28 USC § 995(a)(8), (9), (12), (13), (15), (16), (17), (21), (b), (c)]. With amendment 488, the Commission lived up to the best intentions of its creators.

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[15] Reference to "policy judgments" by Congress may be somewhat ironic. At the time it was passed in the Senate, a member referred to § 841(b)(1)(A),(B) as a "sanctimonious election stampede", [132 Cong. Rec. 26441 (9/26/1986) (Sen. Evans)]; another Senator lamented "[v]ery candidly, none of us has had an opportunity to study this enormous package." 132 Cong. Rec. 26462 (9/26/1986) (Sen. Mathias). This is not surprising. "Mandatory minimums . . . are frequently the result of floor amendment to demonstrate emphatically that legislators want to 'get tough on crime'. Just as frequently they do not involve any careful consideration of the effect they might have on the Sentencing Guidelines as a whole." Rehnquist, *Remarks*, *supra*, at 10.

5. *Chapman* Does *Not* Preclude Application of Amendment 488 to Weight Calculation Under § 841

Respondent argues that "[e]ven if the Commission did have a role to play in construing Section 841(b) . . . *stare decisis* requires that the Commission's approach be evaluated for its conformity to governing precedents . . . including *Chapman*." (Resp. Br. at 33) Respondent interprets petitioner's brief as an invitation to overturn *Chapman*. It is not. It is a request that this Court interpret the whole of § 841(b), including aspects touched on in *Chapman* in light of the Commission's expert empirical findings. This request is in keeping with principles of *stare decisis* and sound canons of statutory construction, as appears below.

Although *Chapman* was "generically" a case of statutory interpretation, *this Court was not asked to construe the statute as a whole*, but rather a few isolated words in a lengthy and complicated text. But the gravamen of § 841(b) is not the three simple words "mixture or substance", but rather the establishment of mandatory and uniform penalties for eight common "street" drugs of abuse. Because Congress provided identical penalties based on different quantities of these drugs and because the listed quantities correspond to similar numbers of *doses* of the drugs, [*Chapman, supra*. 500 U.S. at 475, n. 12, (Stevens, J., dissenting); *United States v. Marshall*, 908 F.2d 1312, 1334 (7th Cir. *en banc*) (Posner, J., dissenting), *aff'd sub nom. Chapman, supra*], there is every reason to suppose that Congress viewed these different quantities as being *in pari materia*. Because this Court in *Chapman* was called upon to construe only the phrase "mixture or

substance," it was forced to disregard this aspect of the statute in order to give plain meaning to the isolated text actually before it. But there is no reason to suppose that a genuine construction of the statute, even a "plain meaning" one, ought to ignore so important a portion of the statutory text as the part that says "ten years" and applies that penalty to supposedly proportionate quantities of drugs in "market" form. To the contrary, it is established by the jurisprudence of this Court that a statute is to be construed (albeit "plainly") in accordance with its "language and design . . . *as a whole*." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (emphasis added); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1989). Amendment 488 preserves the "market-oriented" meaning of "mixture or substance" in the context of § 841(b) as a whole. This is not surprising, since the amendment was based on empirical evidence about the actual workings and impact of the statute *as a whole* in hundreds of cases over many years.

Whether or not deference to the Commission's handiwork falls strictly within the ambit of this Court's doctrine in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), or within the deference afforded by Courts to the "wise solutions" proffered by the Sentencing Commission, [e.g., *United States v. Irwin*, 2 F.3d 72 (4th Cir.) (Wilkins, J.), *cert. den.*, 114 S.Ct. 1086 (1993) (collecting cases); *United States v. Hill*, 48 F.3d 228, 231 (7th Cir. 1995) (Posner, J.) (non-binding Commission policy statements entitled to "great weight" in light of Commission's expertise on sentencing issues)], this Court should use this case as an opportunity to construe § 841(b) *as a whole* in light of realities uncovered by the

Commission. This may spell the end of "gross weight" punishment in LSD cases, but it will do no violence to principles of *stare decisis*. Construing § 841(b) in light of amendment 488 implements the entirety of Congress' Anti-Drug Act sentencing scheme while leaving the essential holding in *Chapman* intact.

Applying amendment 488 implements Congressional intent in another subject area as well. A decade ago, Congress made the decision that a crisis in the criminal justice system was to be resolved by a unique administrative agency whose members would bring judicial experience, plenary investigatory resources, and flexible rulemaking power to bear on technical sentencing issues. Congress contemplated a *dialogue* between the Commission and the Courts, [*Braxton v. United States*, 500 U.S. 344, 348 (1991)], in which the Commission's expertise would inform the judiciary just as happened here. In promulgating amendment 488 the Commission lived up to the vision of its proponents; it established proportionate sentencing practices, on the basis of thorough empirical data, with an eye towards implementing a penalty statute as a uniform whole. Whether the Commission's lead *must* be followed or merely *should* be followed, the message is clear: this Court should heed the Commission's handiwork and interpret § 841(b)(1) to reflect the realities of the drug markets in a real world.

"It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde v. United States*, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting). This Court has the rare opportunity to avoid such misfortune here. Section 841(b) should be assessed in light of the

expertise of the Commission entrusted by Congress to inform the Courts precisely as it has done here.

DATED: November 19, 1995

Respectfully submitted,

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APPENDIX A

Proposed Amend. 50 (57 Fed. Reg. 62832, 62853)

50. *Synopsis of Proposed*

Amendment: This amendment bases the offense levels in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) on the amount of actual LSD involved to eliminate the disparately high offense levels applicable to low-level traffickers in LSD. The dosage quantity of LSD is so small that at present nearly all of the weight used to determine a defendant's punishment comes from the weight of the carrier. Thus, a defendant who has enough pure LSD to produce 65,000 doses has an offense level that is the same as a defendant with blotter paper containing 500 doses of LSD.

Proposed Amendment: The asterisk footnote to subsection (c) of § 2D1.1 is amended by adding after the first paragraph the following new paragraph:

"In determining the weight of LSD, use the actual weight of the LSD itself. The weight of any carrier medium (blotter paper, for example) is not to be counted."

APPENDIX B

Testimony of Denise Helou 3/22/1993
USSC Hg. on Prop. Amend. 50

[p. 173] CHAIRMAN WILKINS: Thank you very much.

We have a panel now of Gene Brown, Faye Flanagan, Douglas Thrasher, Denise Helou and Marlene Miller. Please come around. Do you have one spokesperson, will you all speak, or how do you want to do it?

Well, I hope you will allot your time however you want to, so it suits us fine. Thank you.

MS. HELOU: Hi. My name is Denise Helou and I am here today to present to the Sentencing Commission information that I have collected in the past 6 months about the LSD carrier weight issue. I have collected this information for families against mandatory minimums.

This information has come to me in the form of a survey which I have mailed to over 120 LSD offenders serving time in Federal Prison. My intent in conducting this survey was to show the inequities in sentencing that have been created by the judicial policy of including the carrier-weight of the LSD when determining the total weight of the drug.

The results of the survey have been put into graphs which you all have. LSD is not like most drugs, in that it [p. 174] is sold by doses, not by weight. The value of cocaine, heroin and marijuana is determined by their weight. Six grams of cocaine is worth twice as much as 3 grams of cocaine. With regards to LSD, the drug cannot

be cut to in crease street value. The drug potency remains the same, regardless of what type of carrier is used.

To show how the actual sentence of each offender is not congruous to the weight used, let's begin by describing how there is no correlation between the amount of drug and its weight when the carrier is included. Let's look at our first graph, which charts the amount of LSD on the horizontal axis against the weight of the drug on the vertical axis. This is the graph that is hand-drawn.

The data on this graph represents information from 64 prisoners who responded to the survey. As you can see, the weight of the drug does not increase proportionately with the amount of drug. The graph does not demonstrate any such pattern in drug weights. Look, for example, at offenders who are charged with 1,000 doses. There were 8 altogether, including two pairs of co-defendants. The six separate weights are, in grams, 5.789, 6.53, 8.745, 8.9, 9 and 29. This range includes guidelines 28 through 32.

[p. 175] Some of the other carrier examples are even heavier. Reed Styers, 156-month sentence was severe, because his 8,000 doses were on 160 grams of tablets. Charles Smith was originally convicted for 360 hits on blotter weighing 2.9 grams. At his sentencing hearing, 5 hits on sugar cubes were added to his total weight. Those 5 sugar cubes weighed 11 grams. Those 5 doses raised his guideline level from a 26 to a 32. There is just no connection between the amount of drug and its weight. Likewise, there is no connection between the weight and the sentence.

The second graph attempts to show the disparities in sentencing that occur when the carrier-weight is included by demonstrating the inequities when assigning the initial base offense level.

I limited my study group to first offenders placed in criminal history Category 1, to reduce the variables caused by sentencing procedures. If the sentences were reflective of the drug amounts, the base guideline levels, the guideline set before enhancements and reductions would steadily rise as the weighs increase. This is clearly not the case, as we can see the guideline level jump from 30 to 32, back down to 30 and 28 again, and then do the same for [p. 176] the higher levels. This results in disproportionate sentencing.

Lester Liston had a distribution charge for 2,500 doses which weighed a heavy 33 grams. His 10-year sentence was more than Doug McMillan's 97-month sentence, whose 5,833 doses only weighed 25.84 grams. Michael Gage also received a 97-month sentence for his 1,545 doses, simply because his blotter paper weighed 13.5 grams. Chris Boothe, with only 599 doses, received a 121-month sentence because of heavy blotter paper, which put him in the guideline level of 32.

The lower line charts what the guideline would have been if the dosage equivalency of .05mg per dose is used. The equivalency was set by the Commission and is using cases where there is no actual LSD-2A, a circumstance which only happened once in my study. The figure appears to be fairly accurate for those offenders whose LSD was tested and weighed without the carrier weight.

In the examples of James Wehring, the 7,000 doses he was charged for conspiring to distribute did not exist. As a result, the court had to use the .05mg figure, giving him a guideline of 18. His is the only case in which this method was used to determine a sentence, thus creating even [p. 177] more inequity in the sentencing process.

If such a uniform method, be it a formula or the weight of the actual LSD, were used for all defendants, the courts would not see many of the sentencing problems that exist today. An offender with 599 doses would not receive the same guideline level of 32 as someone who has 5,833 doses. The same applies to a man charged with 2,400 doses and a woman with 17,767, both of whom were placed in level 34.

As it stands today, those with smaller amounts of drugs are often punished more severely than those with larger amounts. LSD sentences are not based on the amount of drug, but, rather, on the weight of the carrier. Using the actual weight of the LSD or an accepted uniform weight results in a fair and sound sentencing structure.

CHAIRMAN WILKINS: Thank you very much.

Anyone else?

COMMISSIONER MAZZONE: How again did James Wehring get down to Level 18? You say there was a conspiracy to distribute 7,000 doses?

MS. HELOU: Right.

COMMISSIONER MAZZONE: And that was not proven or was –

[p. 178] MS. HELOU: No, it was proven, but the government did not have any actual LSD to weigh, since it was a conspiracy charge, so they were forced to use the .05mg equivalency.

COMMISSIONER MAZZONE: I see. There was no paper, there was no physical evidence, no carrier?

MS. HELOU: There was no physical evidence, and there have been other cases where they have been no physical evidence, but they used someone else's drug, someone's connected weight, but in this case they could not do that, so they were forced to use the .05mg.

CHAIRMAN WILKINS: Other questions?

[No response.]

* * *

APPENDIX C

Proposed Amendment 50(A)

Substitute Amendment 50(A)

§ 2D1.1. *Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy*

* * *

(c) DRUG QUANTITY TABLE

* * *

In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to [Option A – 0.05 mg] [Option B – 0.08 mg] of LSD for the purposes of the Drug Quantity Table.

APPENDIX D

Commission Discussion Memo on Amendment 50(A)

proposed Amendment 50

Discussion: The attached chart prepared by the Drug Enforcement Administration, titled LSD Potency,[1] shows average potency per dose from 1986-1991. From this chart, the average dose is about 0.05 milligrams of LSD (about 50 micrograms). [Note that the DEA chart is in micrograms, not milligrams.] Most LSD is between 0.02 milligrams (20 micrograms) and 0.08 milligrams (80 micrograms) per dose. Thus, if the Commission decided to weigh only the LSD and not the carrier medium, a weight of 0.05 milligrams per dose would provide a reasonable approximation. In fact, a recent DEA publication states that "the DEA standard dosage unit for LSD is 50 micrograms"[2] [50 micrograms is equal to 0.05 mg]. Use of a standard dosage unit for cases in which the LSD is on a carrier medium will reduce unwarranted disparity due to the weight of the carrier medium and will be simpler to apply than requiring the extraction of LSD from the carrier medium to determine its weight.

Using 0.05 milligams as the weight for each dose of LSD on a carrier medium would mean that offense level 26, for example, would begin at 20,000 doses of LSD (20,000 doses at 0.05mg = 1 gram). The wholesale price estimated by DEA for 20,000 doses of LSD is from $6000 to $80,000.[3] The comparable quantity of heroin at level 26 is 100 gms (wholesale price estimated by DEA to be between $5,000 and $26,000 at the kilogram level; the price at the 100 gm level would be significantly higher).[4] The comparable quantity of cocaine at level 26 is 500 grams (wholesale

price estimated to be between $5,500 and $20,000 at the kilogram level; the price at the 100 gm level would be significantly higher).[5]

A more conservative strategy would be to select 0.08 milligrams as the weight to be used for each dose of LSD on a carrier medium. Selection of 0.08 mg as the appropriate dosage unit would ensure that most LSD cases would have an actual dose than is less than this amount, yet would provide a total weight per dose that is substantially less than the current weight of LSD and blotter paper. At 0.08 mg per dose of LSD, offense level 26 would start at 12,500 doses of LSD (12,500 doses at 0.08 mg each = 1 gm of LSD). The wholesale price estimated by DEA for 12,500 doses of LSD is from $3750 to $50,000.[6] The comparable quantity of heroin at level 26 is 100 gms (wholesale price estimated by DEA to be between $5,000 and $26,000 at the kilogram level; the price at the 100 gm level would be significantly higher).[7] The comparable quantity of cocaine at level 26 is 500 grams (wholesale price estimated by DEA to be between $5,500 and $20,000 at the kilogram level; the price at the 100 gm level would significantly higher).[8]

In the opinion of the Commission's General Counsel, either option appears to have a rational basis and, therefore, should withstand legal challenge. However, of the two options, Option A (0.05mg per dose) appears to have stronger support in the empirical data; therefore, it would appear to be the easier to sustain in the face of possible legal challenge.

Recommendation: Adoption of Substitute Amendment 50(A) is recommended using a weight of [0.05 mg per

dose (Option A)] or [0.08 mg per dose (Option (B))] of LSD when the LSD is on a carrier medium. If the Commission desires to approximate the average actual LSD per dose, the weight of 0.05mg per dose [Option A] should be adopted. If the Commission desires to ensure that its weight per dose is equal to or grater than the actual LSD weight in most cases, a weight per dose of 0.08 mg [Option B] should be selected.

---

[1] U.S. Department of Justice, Drug Enforcement Administration, LSD Situation Report (February 1992) at 49.

[2] Id. at 31.

[3] Id. at 48.

[4] U.S. Department of Justice, Drug Enforcement Administration, Illegal Drug Price/Purity Report; United States Calendar year 1988 through September 1991, at 3. Note: Prices quoted above are for the first nine months of 1991.

[5] Id. at 1. Another way to compare LSD with heroin and cocaine is to compare the street prices that will result from a level 26 quantity of each substance. The main reason for comparing street prices is the issue of purity. The purity of LSD does not change as it moves through the distribution chain from a wholesale to a retail level. LSD is virtually pure LSD at the wholesale level and the street level. Correspondingly, the price of LSD does not go through radical changes as it moves through the distribution chain. In contrast, controlled substances such as heroin and cocaine are imported at fairly high purity levels and must be heavily diluted before they can be consumed. They are diluted or "cut" many times as they move down the distribution chain and at the same time there is a rise in price which is not proportional it, but greater than, the value of the actual controlled substance in the mixture compared to its value at the previous level. To control for the way that controlled substances move through the distribution chain, looking at the end price, the "street price," of the various

substances would be appropriate. Making the comparison by using street level prices produces the following results:

Street Prices for Offense Level 26 Quantities

Drug	Price
LSD (1 gm; 0.05 mg per dose)	between $20,000 and $200,000
Heroin (100 gm)	between $94,000 and $140,000*
Cocaine (100 gm)	between $31,000 and $136,000.

* The price for heroin is based on price per gram and provides a low estimate of actual street value of heroin because heroin is not sold on the gram level on the street. Street level heroin sales very greatly in weight from bags of .03 grams to .10 grams and purities ranging from as low as 10% to about 40%. Because of this great fluctuation and range in the heroin market at street level, DEA was does not provide street level prices.

[6] Id. at 48.

[7] Id. at 3.

[8] Id. p. 1.

APPENDIX E

Proposed Amendment 50(B)

Substitute Amendment 50(B)

§ 2D1.1 *Unlawful Manufacturing, Importing, Exporting, Trafficking, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy*

* * *

Commentary

* * *

Application Notes:

* * *

16. *Where the court finds that inclusion of the particular weight of the carrier medium in an LSD case (e.g., a sugar cube rather than blotter paper) increases the total weight and therefore the sentence exposure, and the increase is unrelated to the seriousness of the defendant's offense, a downward departure may be warranted to an offense level more appropriate to the seriousness of the offense (assuming a more typical carrier medium). A departure on this basis is not warranted, however, if the defendant has any prior criminal record counted under § 4A1.1(a), (b), or (c) or if anyone involved in the instant offense possessed a weapon.*

APPENDIX F

Substitute Amendment 50(A) (Amendment 488)

Substitute Amendment 50(A) [Revised 4/19/93]

§ 2D1.1. *Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy*

* * *

(c) DRUG QUANTITY TABLE

* * *

In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to [0.4]mg of LSD for the purposes of the Drug Quantity Table.

Commentary

* * *

Application Notes:

* * *

16. *LSD on a blotter paper carrier medium typically is marked so that the number of doses ("hits" per sheet readily can be determined. When this is not the case, it is to be presumed that each ¼ inch by ¼ inch section of the blotter paper is equal to one dose.*

In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.

* * *

Background:

Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier would produce unwarranted disparity along offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of [0.4] milligrams for purposes of determining the base offense level.

The dosage weight selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of .05 milligrams (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Since LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier recognizes (A) that offense levels for most other illicit drugs are based on the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in Chapman v. United States, 111 S. Ct. 1919 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium on which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level per dose of LSD and a carrier with that for the same number of doses of actual PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Note that treating LSD on a carrier as weighing 0.5 milligrams per dose would produce offense levels equivalent to those for PCP, which has a weight of 5.0 milligrams per dose.)

Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of "mixture or substance" for the purpose of any mandatory minimum sentence (see § 5G1.1; Chapman v. United States, supra.).

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(8)

Supreme Court, U.S.
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No. 94-9088

In The

Supreme Court of the United States

October Term, 1995

MEIRL GILBERT NEAL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR THE NATIONAL ASOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should federal courts, when interpreting the statute establishing a mandatory minimum sentence for crimes involving more than a specified weight of LSD, calculate the weight of the "mixture or substance" in a manner consistent with the expert view of the Sentencing Commission regarding the most fair and rational meaning of this statutory language?

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No. 94-9088

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MEIRL GILBERT NEAL,

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BRIEF FOR THE NATIONAL ASOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

This amicus brief is filed pursuant to Rule 37 of the Rules of the Supreme Court of the United States. Both petitioner and respondent have granted amici consent to file this brief, and amici have filed the letters of consent with the Clerk of the Court.

INTEREST OF AMICI

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 8,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives is to ensure the proper administration of criminal justice and to promote fair and consistent application of sentencing laws. Thus, members of the NACDL have a vital interest in ensuring that federal sentencing statutes are construed in a manner that will allow sentencing courts to avoid imposing arbitrary and unjust sentences based on factors bearing no relation to proper sentencing purposes.

Families Against Mandatory Minimums Foundation (FAMM) is a nonprofit, nonpartisan, educational association that conducts research and advocacy work regarding the cost of mandatory minimum sentencing in terms of public expenditures, perpetuation of unwarranted and unjust sentencing disparity, and the transfer of the sentencing function from the judiciary to the prosecution. Founded in 1991, FAMM has 30,125 members nationwide with chapters in 35 states. FAMM conducts sentencing workshops for its membership, publishes a newsletter,

serves as a sentencing clearinghouse for the media, and researches cases for pro bono sentencing litigation.

FAMM's fundamental mission is to compile individual case studies of lives affected by mandatory minimum sentencing, such as 18 year old Nicole Richardson's. Nicole's boyfriend was a small-time drug dealer targeted by undercover agents who called Nicole's house looking for him to complete an LSD sale. Nicole gave them her boyfriend's phone number, and her role in the conspiracy cost her 10 years of her life. Her boyfriend plead guilty and provided information that reduced his sentence to five years. If the Sentencing Commission's interpretation of LSD weight were applied in Nicole's case, she would serve 46 months. FAMM submits this brief on behalf of Nicole, and the thousands of other FAMM members, inmates, and their families who are directly affected by LSD sentencing laws.

SUMMARY OF ARGUMENT

The statute providing for mandatory minimum penalties for drug offenses based on the weight of LSD involved in a case applies when a "mixture or substance containing a detectable amount" of LSD reaches the designated weight. In 1991, this Court decided, in *Chapman v. United States*, 500 U.S. 423 (1991), that the statute requires sentencing courts to consider the combined weight of LSD and its carrier. The holding of the case did not reach the question of *how* courts should calculate the weight of the carrier.

The federal sentencing guidelines use this same statutory language ("mixture or substance") to determine the proper offense level for a drug sentence. Since 1993, the guidelines have assigned a uniform weight of 0.4 mg for each dose of LSD involved in a case, regardless of the literal combined weight of the drug and its carrier medium. Federal courts interpreting the mandatory minimum penalty statute should use the uniform weight approach adopted by the Commission rather than including the actual combined weight of the LSD and its carrier medium in each case. There are two reasons why courts should adopt this reading of the statute.

First, the selection of a method for calculating the weight of a "mixture or substance" under the statute is more a policy choice than a reading of statutory language or legislative history. The statutory language is susceptible of a number of readings on this question and the legislative history is silent. In this setting, this Court has often recognized the value of relying for guidance on the views of politically accountable administrative bodies. Although this Court may not be compelled in this case to defer to the views of the Sentencing Commission under the *Chevron* doctrine, it should nonetheless choose for itself to give great weight to the outcome of the Commission's public process for developing this amendment to the guidelines.

Second, this Court should embrace the Commission's reading of the statutory language because of the experience of the Sentencing Commission and its ability to create a comprehensive sentencing policy. The Commission has access to information about a wide range of drug sentences. This information gives the Commission the

best view of the potential problems when courts impose different sentences for LSD offenses involving an equal number of doses, but unequal weights because of the differing weights of the carriers. It also allows the Commission to assess the danger that some LSD offenders will receive longer sentences than offenders involved with comparable amounts of more dangerous drugs. Both Congress and this Court have recognized the central coordinating role of the Commission in creating a comprehensive federal sentencing scheme. This Court should interpret the statute to fit best with the sentencing guidelines.

ARGUMENT

I. THE SENTENCING COMMISSION'S INTERPRETATION OF THIS STATUTORY LANGUAGE REFLECTS A POLICY DETERMINATION DESERVING JUDICIAL DEFERENCE

In 1986 the Congress passed a statute, now codified as part of 21 U.S.C. § 841(b)(1), creating mandatory minimum sentences for crimes involving specified amounts of lysergic acid diethylamide (LSD) and several other controlled substances. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. The sentences apply in cases involving certain weights of a "mixture or substance containing a detectable amount" of the controlled substance.

When the United States Sentencing Commission created its initial set of sentencing guidelines in 1987, it incorporated the language from 21 U.S.C. § 841(b)(1) into § 2D1.1 of the guidelines, dealing with punishments for

drug offenses. The "drug quantity table" of § 2D1.1(c) sets offense levels according to the weight of the controlled substance involved in a case, and states that "the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." U.S.S.G. § 2D1.1(c). An application note to the guideline states that " '[m]ixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841." U.S.S.G. § 2D1.1(c), comment. (n. 1).

The 1987 set of sentencing guidelines gave no special guidance for calculating the weight of LSD, even though the carrier medium used with LSD functioned differently from the diluting agents used with some other controlled substances. Unlike drugs such as heroin, which are sold by weight (including the weight of any diluting agent), LSD is commonly sold by dose, regardless of weight. Hence, the literal combined weight of the LSD together with its carrier does not indicate the number of possible sales, or any other measure of real harm.

Things stood at this point when this Court decided *Chapman v. United States*, 500 U.S. 453 (1991). The question presented in that case was whether the weight of a carrier medium for LSD should be excluded from the "mixture or substance" under the statute defining eligibility for a mandatory minimum sentence. The Court, after noting that the Sentencing Commission had not addressed the question, decided that the weight of the LSD carrier medium should not be excluded from the calculation, because the LSD is to some extent "mixed" with the carrier. Id. at 461-62.

In 1993, the Sentencing Commission turned its attention to the special difficulties of calculating the relevant weight of LSD. Amendment 488 to the guidelines assigned a uniform weight, 0.4 mg, to each dose of LSD. This weight accounted both for the weight of the LSD itself, estimated to be about 0.05 mg, and for a standardized carrier medium. United States Sentencing Commission, *Guidelines Manual* § 2D1.1, Appx. C, amendment 488 (Nov. 1994).

Because LSD is sold in carrier media of different weights (blotter paper, sugar cubes, liquids, and so on), the uniform weight per dosage under the new guideline commentary would not reflect the actual weight of the LSD and its carrier in every case. However, the Commission adopted its uniform weight to eliminate disparities among LSD offenders with the same number of doses but different actual weights, and to eliminate the disparities between LSD offenses and offenses involving comparable amounts of other controlled substances. As the commentary to the amendment explains: "Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level." U.S. Sentencing Comm'n, *Guidelines Manual*, Appx. C, amendment 488 (Nov. 1994).

A. Congress did not select a particular method for calculating the weight of the carrier medium for LSD.

The mandatory minimum sentence statutes for LSD resolve some questions about the relevant amounts of the drug, but not others. The statutes, 21 U.S.C. §§ 841(b)(1)(A)(v) and 841(b)(1)(B)(v), apply to offenses involving at least 10 grams and at least 1 gram, respectively, of "a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD)." In comparison, the mandatory minimum sentence statutes for a few other controlled substances address both the pure form of the drug and a "mixture or substance containing a detectable amount" of the drug. See, *e.g.*, 21 U.S.C. § 841(b)(1)(A)(iv) ("100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP)").

The clear meaning of this language indicates that a sentencing court cannot consider the weight of LSD alone, without assigning any weight to its carrier. Such a reading would convert the statutory language "mixture or substance" into surplusage. It would also ignore the difference between the sections covering LSD and the sections covering other drugs such as PCP, which give alternative weights for the pure form and the diluted form of the drug. The LSD provision offers no alternative for sentencing based on the weight of the pure drug, and reading such an alternative into the statute would change its meaning. The Court in *Chapman v. United States*, 500 U.S. 453, 468 (1991), concluded on the basis of these arguments that "the statute requires the weight of the

carrier medium to be included" when a court determines the proper sentence for trafficking in LSD.

Although the statutory language makes it clear that a sentencing court must consider the weight of the carrier in LSD cases, it does not specify *how* the court should calculate the weight. Courts might choose to consider the actual gross weight of the drug and the carrier in each case, but the statute does not explicitly give such instructions. Alternatively, a court might consider the weight of only some portion of the carrier – for instance, the portion of a single section of blotter containing the LSD. The court might choose from a variety of techniques for detecting LSD in a mixture or substance, each with different capacities for detecting small amounts of the drug. Or a court might choose, as the Sentencing Commission has chosen here, to assign a presumptive uniform weight to the carrier based on the number of doses, since LSD is sold by the dose rather than by weight.

Each option makes sense of the statutory language, "10 grams or more of a mixture or substance containing a detectable amount" of LSD. Each gives the most severe sentences to the offenders involved with the largest amounts of LSD, and each recognizes that carriers are necessary for street-level sales of the drug.

The legislative history provides no additional guidance on the question of how to calculate the weight of LSD under the statute. The specific references to LSD in the legislative history do not mention the issue. *See* 132 Cong. Rec. 26761 (1986) (statement of Sen. Harkin). A recurring theme in the legislative history is Congress' desire to adopt a "market-oriented" penalty structure,

one that punished drug trafficking for amounts of drugs as they are sold, rather than amounts of pure controlled substances. H.R. Rep. No. 845, pt. 1, 99th Cong., 2d Sess. 11-12, 17 (1986). A number of methods of calculating weight might further that purpose. The choice among those methods does not turn on the language of the statute, or its legislative history. It turns on the interpreter's views of wise and effective sentencing policy. A court would have to engage in a legal fiction to make such a choice and impute it to Congress.

B. Federal courts should look to administrative bodies with delegated policymaking authority for guidance on statutory construction questions that amount to policy choices.

The U.S. Sentencing Commission's interpretation of the statutory phrase "mixture or substance" for use in setting LSD offense levels under the sentencing guidelines is a policy determination Congress delegated to this agency, just as it delegates the finer points of policymaking authority to other agencies. Under 28 U.S.C. § 994(a)(1), the Commission has the power to establish guidelines that courts must use, unless the guidelines conflict with a statute or the Constitution, or the court uses its statutory departure power. *See* 18 U.S.C. § 3553(b). As this Court stated in *Stinson v. United States*, 508 U.S. ___, 113 S. Ct. 1913, 1919 (March 24, 1993), "[t]he Sentencing Commission promulgates guidelines by virtue of an express congressional delegation of authority for rulemaking. . . . Thus, the guidelines are the equivalent of legislative rules adopted by federal agencies."

Because some agency interpretations of statutes amount to policy decisions, federal courts must accept that reading of the statute under some circumstances. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), this Court compelled lower federal courts to defer to reasonable agency constructions of the statutes they administer, so long as Congress has left a range of choices open to the agency:

> If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43. The *Chevron* Court insisted on deference to these statutory constructions because of the political accountability of federal agencies. The Court concluded that those officials that the President appoints for limited terms are in a better position than judges to

> make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Id. at 865-66. Some lower courts have invoked the *Chevron* doctrine in upholding sentencing guidelines when they have been challenged as inconsistent with a sentencing statute. See *United States v. Shabazz*, 933 F.2d 1029,

1035 (D.C. Cir.) (Thomas, J.), *cert. denied*, 502 U.S. 964 (1991).

The mandatory deference required of federal courts under the *Chevron* doctrine may not, strictly speaking, apply to this Commission decision. First, the *Chevron* doctrine applies only to statutory constructions by an "agency charged with the administration of the statute in light of everyday realities." 467 U.S. at 866. The Sentencing Commission does not have primary responsibility for administering mandatory minimum statutes; sentencing courts do. While it could be said that the Commission has primary responsibility for "administering" most sentencing statutes and developing policy within the statutory framework, its responsibility for administering mandatory minimum statutes is more problematic. Mandatory minimum statutes create an ad hoc deviation from the proportionate sentences available in a guideline system. They empower courts to ignore the dictates of the sentencing guidelines. U.S. Sentencing Comm'n, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 26-34 (August 1991). The guidelines themselves contemplate that sentencing courts, when reading a mandatory minimum statute or any other sentencing statute in conflict with the guidelines, will follow the statute rather than the guideline. U.S.S.G. § 5G1.1(a), (b). *Compare Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority"); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (*Chevron* deference does

not apply to prosecutorial interpretation of criminal statute, no agency has specific responsibility for administering criminal statute).

Second, *Chevron* may not fully apply to this Commission decision because the Commission was interpreting statutory language that courts had interpreted independently before the agency reached its present position. This Court decided *Chapman v. United States*, 500 U.S. 453 (1991), nearly two years before the Commission explicitly addressed the special problems of measuring the weight of LSD. In somewhat similar contexts, this court has stated that *stare decisis* gives an interpreting court the discretion to ignore the agency's later different reading of a statute, at least if the existing judicial reading of the statute was independent and longstanding. See *Lechmere v. NLRB*, 502 U.S. 527 (1992) (reaffirming longstanding judicial reading of union election statute despite recent contrary reading by NLRB); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) (reaffirming longstanding judicial reading of rate regulation statute despite recent conflicting reading of statute by ICC).

On the other hand, there are reasons to believe that this second limitation on *Chevron* does not apply here. The *Chapman* Court's reading of this statutory language cannot be said to be longstanding; no institutional practices or private conduct have built up in reliance on the opinion. Further, even though *Chapman* addressed the same statutory language involved in Amendment 488 to the guidelines, the Court was not addressing precisely the same question as the Commission. The precise holding of *Chapman* is that the sentencing court must include the weight of the carrier medium: "We hold that the

statute requires the weight of the carrier medium to be included when determining the appropriate sentence for trafficking in LSD." 500 U.S. at 468. Only in dicta did this Court suggest that the "entire" weight of the carrier must be included. Id. at 459. Viewed in this light, the Commission may have answered a different question about the statutory language than did the holding in *Chapman*. Thus, the *Lechmere* limitation on deference to statutory interpretations by administrative agencies may not apply.

Even if *Chevron* does not compel federal courts to accept any reasonable Commission reading of the statutory language, the courts should still choose for themselves to adopt the Commission reading of the statutory language here. Where the statutory language or legislative history makes the choice, an agency's views add nothing. And where there is no available agency view of the statutory question (as was the case for this statute at the time of the *Chapman* case), the Court must make the choice alone. But when Congress has left several options open under the statutory language, and an administrative body has expressed its view about the best way to implement the language consistent with congressional purposes, the federal courts should give that agency view of the statutory language a presumption of legitimacy, even if the agency's reading is not strictly binding on the courts.

The Sentencing Commission is a politically accountable body (at least in comparison to federal courts) that has adopted language from a statute within its area of delegated responsibility for use in a guideline. The President appoints the seven members of the Sentencing Commission with the advice and consent of the Senate;

commissioners serve terms of six years. 28 U.S.C. § 991(a). The topic of Amendment 488 was the subject of a preliminary notice in the Federal Register, and was part of the agenda of a public meeting. 57 Fed. Reg. 62832 (Dec. 31, 1992). The text of the amendment and an explanation of the proposal appeared later in the Federal Register, along with an invitation for interested parties to submit comments to the Sentencing Commission. 58 Fed. Reg. 27148, 27155-56 (May 6, 1993). This process was required under the notice-and-comment rulemaking procedures of 5 U.S.C. § 553, imposed on the Sentencing Commission under 28 U.S.C. § 994(x). The Commission also submitted Amendment 488 to Congress, as part of a package of amendments, six months before its effective date. 58 Fed. Reg. 27148 (May 6, 1993); *see* 28 U.S.C. § 994(p).

This is not to say that every pronouncement of the Sentencing Commission about statutory words and phrases should carry weight with courts interpreting those statutes. But here, the Commission made a reasoned policy determination about how best to reconcile this statute with other statutes in the area and with the sentencing guidelines. To the extent that the Court does not follow the Sentencing Commission's reading of the statute in setting mandatory minimum sentences, the Commission's use of the statutory phrase "mixture or substance" in its guideline will have an impact on the sentence in fewer LSD cases. It will leave a larger gap in the guidelines' coverage.

Whether or not the literal dictates of *Chevron* apply here, many of the reasons supporting that doctrine of

judicial restraint and deference are present. Where Congress has passed a statute allowing for a range of policy choices, the political accountability of an administrative body such as the Sentencing Commission should weigh in favor of its policy choice.

II. THE EXPERIENCE OF THE SENTENCING COMMISSION AND ITS ABILITY TO COORDINATE SENTENCING POLICY MAKE IT THE BEST SOURCE OF GUIDANCE FOR A COURT INTERPRETING THIS SENTENCING STATUTE

If the fact that the Commission has exercised delegated power in its reading of this statutory language does not convince this Court to adopt the Commission's view, the Court still might treat the amended guideline as an "interpretive" rule. Interpretive rules are rules that do not have the force of law. 1 Kenneth Culp Davis & Richard Pierce, Administrative Law Treatise § 6.3 (3d ed. 1994). The agency passing the interpretive rule may wish to clarify the meaning of a statute without binding itself or imposing new obligations on the public. Courts do not consider themselves bound by interpretive rules of agencies, but they nonetheless give the rules close consideration during any interpretation of the relevant statute. Id. at 241-47. Similarly, although the Commission's amended guideline has a binding effect on guidelines calculations, this Court might only treat it as a potential source of guidance on how to apply the mandatory minimum statute.[1]

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[1] The analogy between interpretive rules and the Sentencing Commission action in passing Amendment 488 is not perfect, because Amendment 488 traveled through the full notice-and-comment process of the Commission. 58 Fed. Reg. 27148, 27155-56 (May 6, 1993). Interpretive rules do not go through the notice-and-comment process. 5 U.S.C. § 553. Further, the Sentencing Commission intends to bind sentencing courts to this reading of the statute for the limited purpose of setting offense levels for guideline sentences. Nonetheless, the imperfect analogy to interpretive rules serves a limited purpose. It offers guidance about how courts should regard an agency action they do not consider binding.

The key case regarding interpretive rules is *Skidmore v. Swift & Co.*, 323 U.S. 124 (1944). Under the Fair Labor Standards Act of 1938, Congress gave the Administrator the power to enforce the statute, but did not grant any power to create legislative rules to fill in the gaps of the statute. The Administrator announced his interpretations of the statute in "interpretive bulletins," offering notice to employers and others of the agency's enforcement priorities and positions. Although the federal courts were not bound by the interpretive bulletins in determining the meaning of the statute, the Supreme Court still considered them valuable guidance:

> [Interpretive bulletins] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

323 U.S. at 140.

The experience of the Sentencing Commission in matters relating to punishment for drug offenses, together with its careful consideration of the issue of measuring the weight of LSD and carriers, give Amendment 488 "the power to persuade." Even though the Commission used the statutory language to create a related guideline rather than to control the imposition of mandatory minimum sentences, the Court should avail itself of the Commission's experience and careful effort to reach the best interpretation of 21 U.S.C. § 841(b).

A. The Commission's responsibility to monitor all federal sentences for drug offenses puts it in a unique position to guard against unfair disparities in sentences.

The Sentencing Commission has the statutory authority to collect information about every criminal sentence handed down in the federal courts. The Commission must review the presentence report, the guideline worksheets, the court's sentencing statement, and any written plea agreement for every federal criminal sentence. *See* 28 U.S.C. § 994(w). The Commission exercises that authority to develop an extensive database of cases. It uses that information in its efforts to adjust and improve the sentencing guidelines. U.S. Sentencing Comm'n, *1993 Annual Report* 5-12 (1994) (reviewing guideline amendment process and role of working groups).

The data available to the Sentencing Commission makes it possible for the Commission to identify and prevent unwarranted disparities among LSD offenders. Under the statute, one LSD offender with a large number

of doses on a light carrier (or no carrier at all) may receive a lower sentence than the LSD offender with a small number of doses on a much heavier carrier. Because LSD is sold by the dose, there is no moral difference between LSD offenders based on the type and weight of the carrier they choose. See *United States v. Marshall*, 908 F.2d 1312, 1335 (7th Cir. 1990) (Posner, J.).

A court would be able only to speculate about hypothetical injustices under the statute. The Commission, on the other hand, has the data to make a realistic prediction about which injustices are most likely to occur for LSD offenses, and how often. Similarly, the Commission has the capacity to collect and create data on the social harms of controlled substances other than LSD. It also can draw on the experience of probation officers and law enforcement agencies. 28 U.S.C. § 995(a)(8)-(16). On the basis of this information, the Commission can judge the relative blameworthiness of LSD offenders and offenders involved with other drugs, and adjust the guidelines accordingly.

The Commission relied on just such a comparison to other illicit drugs as a reason to support its uniform 0.4 mg weight for each dose of LSD:

> [T]he weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. . . . Thus, the approach

> decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances. . . .

U.S. Sentencing Comm'n, *Guidelines Manual*, Appx. C, amend. 488 (Nov. 1994).

The Commission's ability to collect data year in and year out also gives it the opportunity to adjust the sentencing calculations for LSD and other controlled substances as marketing techniques evolve. Since Congress attempted to create "market-oriented" sentences for drugs, *Chapman*, 500 U.S. at 461, interpretations of the punishment statute ought to reflect, to the extent possible, changes in the marketplace. The Commission is best situated to identify and suggest such changes in interpretation. Indeed, the Commission has created several "working groups" for various aspects of its drug sentencing guidelines, and the working groups have assembled empirical and legal research regarding drug sentences. See U.S. Sentencing Comm'n, *1992 Annual Report* 9 (1993). That research is available to commissioners, commission staff, or members of the public interested in commenting on or proposing a guideline amendment. *See* 57 Fed. Reg. 62832 (Dec. 31, 1992).

The Sentencing Commission has, on this particular subject, exercised its responsibility to research the effects of LSD and to monitor sentencing practices for LSD cases. In December 1992, the Commission published amendments to the LSD guidelines proposed by the Legislative Subcommittee of the Federal Defenders. Those proposals would have eliminated any consideration of the weight of an LSD carrier in calculating a base offense level under the guidelines. 57 Fed. Reg. 62832, 62853 (Dec. 31, 1992).

The Commission held a public hearing on these proposed amendments on March 22, 1993. 58 Fed. Reg. 27148 (May 6, 1993). It then amended the proposal to account for this Court's ruling in *Chapman* and to recognize that the weight of other drugs is calculated by including the weight of inert diluting agents. In April 1993, the Commission submitted the revised amendments to Congress, and the changes did not take effect until November 1, 1993. 58 Fed. Reg. 27148, 27155-56 (May 6, 1993). While the Sentencing Commission does not adequately develop its expertise or explain its choices in all areas, it has done both for Amendment 488. A court construing the ambiguous provisions of 21 U.S.C. § 841(b)(1) could not conduct such surveys, or benefit from the input of so many experienced groups.

B. A coordinating role for the Commission is especially important in sentencing, where Congress emphasized an integrated approach.

The information available to the Sentencing Commission, and the expertise it has developed in LSD sentencing policy, make it possible for the Commission to coordinate sentencing policy in this area. This is precisely the role Congress assigned to the Commission under the Sentencing Reform Act. One purpose of the Commission is to "establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). Its sentencing policies must also "reflect, to

the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C).

In passing more recent sentencing statutes, Congress has continued to recognize the importance of the Sentencing Commission in integrating various statutes into a comprehensive sentencing policy. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, § 280003(b); H.R. Rep. No. 711, 103d Cong., 2d Sess. 388-89, 391, 392 (1994).

C. This Court has already recognized the importance of the Sentencing Commission's coordinating role in creating sentencing policy.

This Court has decided several cases recognizing that courts, when interpreting sentencing guidelines and statutes, need to consider the Sentencing Commission's central role in the creation and coordination of federal sentencing policy. The most important of the cases, *United States v. R.L.C.*, 503 U.S. 291 (1992), directly addresses the responsibility of courts to read statutes in a manner that integrates best with the comprehensive guideline system.

In *R.L.C.*, a juvenile member of the Red Lake Band of Chippewa Indians was convicted of involuntary manslaughter for killing a person in an automobile crash. If R.L.C. had been an adult, the statutory maximum for his crime would have been three years; the maximum prison term under the sentencing guidelines would have been 21 months. The statute covering juvenile detention limits any period of detention to the "maximum term of imprisonment that would be authorized if the juvenile

had been tried and convicted as an adult." 18 U.S.C. § 3072(c). This Court decided that the maximum term "authorized" was the top of the applicable guideline range rather than the longer statutory maximum for involuntary manslaughter. 503 U.S. at 308.

This result made it possible to treat as many cases as possible in a manner consistent with the sentencing guidelines. The Court concluded from the statutory language and legislative history that Congress wanted to integrate juvenile and adult sentences to the extent possible. To do that would require the Court to apply the upper guideline range rather than the statutory maximum:

> The most fundamental of the Sentencing Reform Act's changes was, of course, the creation of the Sentencing Commission, authorized to promulgate the guidelines required for use by sentencing courts. It hardly seems likely that Congress adopted the current [juvenile sentencing statute] with a purpose to conform juvenile and adult maximum sentences without intending the recently authorized Guidelines scheme to be considered for that purpose.

503 U.S. at 305.[2]

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[2] *Stinson v. United States*, 508 U.S. ___, 113 S. Ct. 1913 (1993), deals with a related but distinct issue. That Court concluded that "[c]ommentary which functions to interpret a guideline or explain how it is to be applied controls." Id. at 1918 (citation, quotation marks and brackets removed). Even though the commentary in this case dealt with a phrase drawn from a statute ("crime of violence," from 28 U.S.C. § 994(h)(1)(A)), the decision dealt with the power of *commentary* to influence a court's reading of a guideline, not the Commission's power through a

Lower courts have followed the lead of this Court in reading statutes and guidelines commentary in a way that reinforces the basic structure of the sentencing guidelines. Several courts have addressed the question of whether, under 21 U.S.C. § 841(b), the penalties for crimes "involving" certain amounts of controlled substances should be determined according to amounts covered by conspiracy charges, or instead should include only "relevant conduct" within the meaning of the guidelines. They have concluded that a sentencing court should only include amounts proven at sentencing as relevant conduct, within the meaning of the sentencing guidelines, and not the amounts that might be attributed to the defendant under conspiracy law. These courts have concluded that the use of the relevant conduct concept from the guidelines provided the best reading of the statutory language because it integrated more sentences into a comprehensive approach. The courts chose to follow the Commission's lead on this question even though the Commission had not specifically attempted to interpret the statutory language (crimes "involving" designated amounts of drugs). *See United States v. Irvin*, 2 F.3d 72 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1086 (1994); *United States v. Jones*, 994 F.2d 456 (8th Cir. 1993); *United States v. Martinez*, 987 F.2d 920 (2d Cir. 1992); *see also United States v. McFadden*, 13 F.3d 463, 466 (1st Cir. 1994)

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guideline to influence a court's reading of a statute. *See also Braxton v. United States*, 500 U.S. 344 (1991) (recognizing special role of Commission in resolving lower federal court disagreements over meaning of particular guidelines, but not addressing Commission influence in judicial interpretation of sentencing statutes).

(Breyer, C.J., dissenting) (arguing that mandatory minimum penalty statute for persons who "use" firearms during drug trafficking offense should be construed narrowly to allow wider range of cases to fall within guidelines on same issue).

D. The *Chapman* Court did not have an opportunity to draw upon the experience of the Commission to integrate this mandatory minimum penalty statute into a comprehensive sentencing policy.

The need to coordinate the mandatory minimum penalty statute, 21 U.S.C. § 841(b), with the sentencing guidelines was not an issue in *Chapman v. United States*, 500 U.S. 423 (1991). At that point, the guidelines merely restated the statutory language and offered no additional guidance to sentencing courts. This Court faced the question of whether the sentencing court should exclude the weight of the carrier entirely from its calculation, and answered it as the statutory language required.

In dicta, the opinion also mentioned that a sentencing court should consider the "entire" weight of the carrier. But since *Chapman*, the Sentencing Commission has spoken to this separate question of how a court should calculate the weight of the carrier in a "mixture" of LSD. The Court may now choose the interpretation of the statute that best integrates this statute with the comprehensive scheme of sentencing Congress hoped to achieve. To the extent that statements in the *Chapman* case are inconsistent with this interpretation, this Court should disavow them.

CONCLUSION

The judgment of the court of appeals should be reversed.

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